95-1657
No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ROBERT CHARLES DAVIS M.D.,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari
To The United States Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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110 P

QUESTIONS PRESENTED

Did the Court of Appeals render a decision that was in violation of the Petitioner's Fifth Amendment Right to Due Process, when the Tenth Circuit Court of Appeals stated that the Petitioner did not provide the Court with transcripts from the Petitioner's trial and other proceedings; when in fact transcripts were properly ordered from the Utah Federal District Court, Clerk of the Court -- and it was the **CLERK OF THE COURT WHO IN ERROR DID NOT SEND THE TRANSCRIPTS TO THE COURT OF APPEALS?** (Set forth in Appendix H.)

Was the use of a formal estimating restitution when the Petitioner was convicted of only 32 of 41 counts, though an inexact science and not based on reliable statistical data--clearly erroneous, arbitrary and unsupported by the Record; and in violation of 18 U.S.C. §§ 3363 and 3364 and in **CONTRADICTION** to the law of the Tenth Circuit Court of Appeals?

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Petitioner, Robert Charles Davis M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit who **AFFIRMED** the district court's order denying the motion for a new trial with respect to the voir dire issue and the two evidentiary matters and the order of restitution.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as United States v. Davis, ___ F.3d ____ (10th Cir. 1995) D.C. No. 92-CR-211-W, Nos. 93-4192 & 94-4147 and appears as Appendix A to this Petition as well as the Denial for Rehearing which appears as Appendix B to this Petition.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on July 26, 1995 and the Denial for Rehearing was filed on August 31, 1995. This Court's jurisdiction is invoked under Title 28, U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix C.

STATEMENT OF THE CASE

The United States District Court, Utah District Court, Central Division, had jurisdiction pursuant to Title 18, U.S.C. § 3231.

Petitioner was charged in a 41 count indictment. Counts 1 through 34 alleged violations of the 18 U.S.C. § 1341 (mail fraud). Counts 35 through 41 alleged violations of 18 U.S.C. § 287 (false claims). Petitioner was tried by a jury. The Petitioner was convicted on 32 counts. On October 19, 1993 the Petitioner was sentenced to 56 months incarceration and to pay a $50,000 fine. On May 31, 1994 the Petitioner was ordered to pay a total of $158,508.76 in restitution.

The Petitioner filed an appeal with the Tenth Circuit Court of Appeals who filed a decision on July 26, 1995. In that decision the Tenth Circuit **AFFIRMED** the district court's order denying the Petitioner's motion for a new trial with respect to a voir dire issue and two evidentiary matters, **AFFIRMED** the district court's order of restitution and **REMANDED** the case, however, to permit the district court to make findings on the question of whether the juror's exposure to extraneous information was harmless.

The Tenth Circuit Court of Appeals **AFFIRMED** on the voir dire issue, the two evidentiary matters and in part the order of restitution stating that the Petitioner did not provide the Court with motion hearing, jury trial and sentencing transcripts and was thusly in violation of 10th Cir.R. 10.1.1. as set forth in Appendix D.

In addition the Tenth Circuit Court of Appeals held that the Petitioner's failure to provide trial transcripts runs afoul of 10th Cir. R. 28.2(d) as set forth in Appendix E that requires that "a statement as to where a proper objection and the court's ruling thereon may be found in the record"; and that without the relevant portions of the trial transcript the appellate court has no way of knowing whether the issue was even preserved for appellate review.

With regards to the second part of the restitution issue that was **AFFIRMED** the Tenth Circuit Court of Appeals stated that:

> "[i]n cases like this, where the 'precise amount' of restitution owed is 'difficult to determine,' U.S.S.G. §5E1.1 'authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim."

On August 8, 1995 the Plaintiff, filed a Petition for Rehearing stated that:

a) Transcripts of all trial proceedings were ordered pursuant to Rule 10.1.1 of the Rules of Practice of the United States Court of Appeals for the Tenth Circuit; that transcripts of all trial proceedings from April 7, 1993 to May 7, 1993 were ordered and prepared and filed with the court;

b) the relevant portions of the transcript relating to the issue briefed in Point I.A. of appellant's opening brief were directly quoted in the trial court's ruling on appellant's motion for a new trial (Docket entry 172 a pp 11-12, and 18-19); and that the portions of the transcript quoted in that decision were sufficient to provide the basis for appellate review of the issue related to the errors in the jury selection process raised in Point I.A. of appellant's opening brief;

c) and that merits of the issues in Points I.A., II and III of appellant's opening brief as the issues related to the lack of truthful answers by prospective jurors during the voir dire process and issues related to the admission and exclusion of evidence could be ascertained in the trial transcripts.

On August 31, 1995 the Tenth Circuit Court of Appeals denied the Petitioner's Motion for Reconsideration as set forth in Appendix F.

Petitioner subsequently in Pro Se filed a Petition for Rehearing in Banc. This Petition was subsequently denied by the Tenth Circuit Court of Appeals stating that "[p]ursuant to 10th Cir.R.40.4, the court cannot accept successive petitions for rehearing as set forth in Appendix G.

REASON FOR GRANTING THE WRIT

The Petitioner believes that the Granting of Writ is appropriate since the issues presented are of exceptional public importance for the following reasons:

a) The Petitioner was denied his Fifth Amendment Constitutional Right to "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

b) In toto consideration of all arguments presented by the Petitioner can lead to reversal of the Petitioner's criminal conviction by the Tenth Circuit Court of appeals.

c) There is new case law that mirrors the Petitioner's arguments which holds that it is **REVERSIBLE ERROR** to exclude evidence of legitimate transactions in cases where the crucial issue is fraudulent intent.

d) The us of a formula estimating the worst scenario to determine restitution when the Petitioner was convicted of only 32 of 41 counts, though an inexact science and was not based on reliable statistical data and was clearly erroneous, arbitrary and unsupported by the record, and contrary to the case law of the Tenth Circuit.

DENIAL OF PETITIONER'S FIFTH AMENDMENT RIGHTS

The Petitioner was denied his "due process" rights by no fault of his own.

On October 25, 1993 counsel for the Petitioner ordered Motion Hearings: 3/24/93; 4/2/93; 5/19/93; 6/14/92; Jury Trial: 4/7/93 to 5/7/93: Sentencing Proceedings: 10/18/93; and on June 17, 1994 transcripts for Hearing - January 31, 1994 and March 9, 1994, set forth in Appendix H.

On the reverse side of both order forms under Directions for Using this Form at 3. Court Reporter are the words:

> **"Transcripts in a criminal case...shall be filed within 30 days of the date arrangements for payment are made."**

When the Petitioner discovered that transcripts were not sent to the Tenth Circuit Court of Appeals the Petitioner wrote the Court Report, whom the Petitioner paid in full for the typing of the transcripts. The Petitioner received a letter from Raymond P. Fenlon, CSR dated September 11, 1995 set forth in Appendix I stating that:

> "I only deliver them (the transcripts) to the District Court of Utah, and the Clerk's Office (Ron Black is the current Appeals Clerk in the District of Utah) would deal directly with the Tenth Circuit Court of Appeals with regard to transcripts to be sent to them."

Apparently what had occurred was <u>that despite counsel properly ordering the transcripts from the Court Reporter, those transcripts were not sent to the Tenth Circuit Court of Appeals due to an oversight by the Clerk of the District Court of Utah</u>.

As a result of this oversight by the District Court Clerk, the Tenth Circuit Court of Appeals **AFFIRMED** the District Court's denial of the Petitioner's Motion for a New Trial with respect to voir dire issue and two evidentiary matters and in part the order of restitution.

THE ERROR of not providing the transcripts to the Tenth Circuit Court of Appeals was that of **THE CLERK OF THE DISTRICT COURT OF UTAH**.

By not providing the Tenth Circuit Court of Appeals with the ordered transcripts the Petitioner was denied his "due process" right; and by the Tenth Circuit Court of Appeals not rectifying this error when it was brought to its attention in the Petitioner's Petition for Rehearing was a violation

of the Petitioner's right to "due process." (Set forth as Appendix I.)

IN TOTO CONSIDERATION OF ALL ARGUMENTS WILL LEAD TO A REVERSAL OF JUDGMENT OF CONVICTION

The Tenth Circuit Court of Appeals found that the "presumption of the prejudice arises whenever a jury is exposed to external information in contravention of a district court's instructions," quoting Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919 (10th Cir. 1992), and that "the presumption of prejudice is not conclusive, but the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant," quoting United States v. Hornung, 848 F.2d 1040 at 1044 (10th Cir. 1988).

The Tenth Circuit also stated that under Mayhue, the Petitioner was entitled to rely on a presumption of prejudice which, in the absence of countervailing evidence of harmlessness offered by the government, would be sufficient to support post-trial relief. Because the district court's analysis did not afford the Petitioner the presumption of prejudice recognized by the Tenth Circuit's cases, and because the record on appeal did not permit the Tenth Circuit to make an independent determination of whether the jury's exposure to this material was harmless, a **REMAND** was necessary to provide the district court with an opportunity to make appropriate findings.

However, if the Tenth Circuit Court of Appeals was to also take into consideration the Petitioner's arguments claiming that it was error for the district court to deny the Petitioner's motion for a new trial with respect to the voir dire issue and two evidentiary matters...then the consideration of the total pie, instead of just one piece...could in toto lead to a reversal of criminal conviction.

THERE IS NEW CASE LAW THAT MIRRORS THE PETITIONER'S ARGUMENTS WHICH HOLDS THAT IT IS REVERSIBLE ERROR TO EXCLUDE EVIDENCE OF LEGITIMATE TRANSACTION IN CASES WHERE THE CRUCIAL ISSUE IS FRAUDULENT INTENT

In United States v. Thomas, 32 F.3d, 418 the Ninth Circuit Court of Appeals found that it was reversible error to exclude evidence of legitimate transactions in cases where the crucial issues is fraudulent intent, as set forth in Appendix K. The Thomas case is a mirror image of the Petitioner's case.

Thomas is a case involving a fruit brokerage company that allegedly defrauded fruit growers of the best price for their fruit. The Ninth Circuit reversed the district court that restricted evidence to just "victims" of the alleged mail fraud scheme. (This is exactly what occurred in United States v. Davis).

The critical issue in Thomas was whether the defendant "intended to defraud." The Ninth Circuit found that the trial court erred by barring direct evidence of "either the growers' receipt of benefits, or of their overall perceptions of the scheme." This was true despite the Government's argument that any evidence not related to the specific transactions identified in the indictment was either irrelevant to or cumulative of the testimony of an accounting expert who was permitted to testify for the defense.

Similarly, barring evidence that the Petitioner conducted legitimate transactions prejudiced the Petitioner by preventing the Petitioner from establishing that first admitting habit and routine evidence against the Petitioner (Point II of the Petitioner's Opening Brief) and then subsequently preventing the Petitioner from introducing rebuttal testimony to the Government's habit and custom evidence (Point II of the Petitioner's Opening Brief).

Thomas held that exclusion of testimony by clients (in the Petitioner's case employees and satisfied patients) of the Petitioner who were

satisfied with Thomas's services is reversible error.

The decision in Thomas is applicable to a decision that the Tenth Circuit may make.

THE USE OF A FORMULA ESTIMATING RESTITUTION FOR ALL SERVICES THAT THE PETITIONER PROVIDED OVER A FIVE YEAR PERIOD WAS NOT BASED ON RELIABLE STATISTICAL DATA

The question of whether a formula may be used to determine restitution was improper since the Petitioner was not convicted on all counts (32 of 41 charged) and in and of itself presumed that all billings generated by Petitioner was in part fraudulent.

Since the Petitioner was not convicted on all counts of his indictment it is improper to extrapolate that all billings or even a percentage of all billings from the Petitioner's medical clinic was fraudulent, especially in light of the fact that during the Petitioner's trial the Petitioner was precluded from putting on habit and custom evidence and the trial court's refusal to allow the Petitioner to introduce rebuttal testimony to the Government's habit and custom evidence. See Thomas.

The Petitioner was convicted on a loss amount of $15,402.76. On May 27, 1994 there was a hearing to determine restitution, set forth in Appendix L, whereupon the Court made a Finding of Fact that the amount of the loss was $158,509.00. But this figure presumes that all billings were fraudulent. The Government took its best shot at the Petitioner and was not able to convict the Petitioner on all counts. The counts that the Petitioner was convicted on represented sixteen patients out of 15,000 patient visits over a five year period.

Furthermore, the formula that the Government used to determine the loss was based on an atypical skewed nonrandom sample of patients, all 21 Medicaid charts from 1987. In addition, the sample presumes that the medical practice and billing for private insurance companies is the same as for Medicaid. It is not.

Medicaid cannot be billed for laboratory work, except for the most rudimentary, and yet, with private insurance companies lab work represented as much as 70% of all billing. In addition, nearly all the private insurance companies from July 1987 until July 31, 1992 (the period covered by the criminal indictment) required medical records, and review of lab work before services were paid for. Therefore, it would be reasonable to say, since the lab work was reviewed and paid for after such review that 70% of all billings were not fraudulent and did not represent loss.

It should also be made perfectly clear that there was no evidence presented at trial that there was any other documentation or proven loss of any kind.

What the Government has done, and the district court and Tenth Circuit Court of Appeals has upheld is faulty Boolean logic. What the Government has said was that since there was fraud found in 21 nonrandom patient charts preselected by the Government for analysis at the restitution hearing, that all billings of the 15,000 patient visits over the last five years must be fraudulent, by a percent that was determined by the Court.

Boolean algebra states that all A's can be B's, without all B's being A's. Therefore, it does not make any sense to say that if 21 nonrandom patient charts demonstrate 5% fraud, that 5% of entire collections for the last five years has to represent fraud.

A true way to statistically analyze the patient population sample would have a neutral third party, using a random method analyze 586 charts and then make an evaluation for potential fraud. This, indeed, was not done. (The 586 number was the number that the Government said represented a random sample, and the number with which the Petitioner's expert at the hearing agreed to. This is a far cry from selecting 21 charts that were by-and-large used at trial and said to be random.)

The Tenth Circuit Court of Appeals quoting United States v. Brewer, 983 F.2d 181, 185 (10th

Cir.) (citation and internal quotations omitted), cert. denied, 113 S. Ct. 2348 (1993) that "The determination of an appropriate restitution amount is by nature an inexact science." However, there is a difference from an inexact science that is based on reasonable statistics and a determination of restitution based on 21 nonrandom charts.

In Espinosa v. Roswell Tower, Inc., 32 F.3d 491 (10th Cir. 1994),at 490 the 10th Circuit stated that:

> Under 18 U.S.C. § 3363, the sentencing court is authorized to order a defendant to make restitution to any victim of his offense. In deciding whether to order restitution, the court shall consider, among other things, "the amount of loss sustained by any victim as a result of the offense." 18 U.S.C. § 3664(a).

And inferred that calculation of restitution can be problematic.

In United States v. Grissom, 44 F.3d 1507 (10th Cir. 1995) at 1514 the 10th Circuit held that:

> Congress has authorized restitution "only for the loss caused by the specific conduct that is the basis of the offense of conviction." Hughey v. United States, 495 U.S. 411, 413, 110 S.Ct. 1979, 1981, 109 L.Ed 2d 408 (1990).

The question of whether a formula may be used to determine restitution is a legal question that should be reviewed by this Court. If the use of a formula is found to have been proper, than the Petitioner does not contest the application of this particular formula, nor does he contest the results from the application of this formula.

18 U.S.C. § 3664(a) describes the considerations that the district court is to make in assessing restitution:

> The court, in determining whether to order restitution under section 3663 of

> this title and the amount of such restitution, shall consider the amount of the losses sustained by any victim as a result of the offense...(emphasis added)

The burden of proof as to these issues is described in 18 U.S.C. § 3664(d). That statute provides:

> Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government.

These two statutes must also be read in conjunction with the portion of 18 U.S.C. § 3663(a) which provides:

> "...victims of an offense...means any person directly harmed by the defendant's criminal conduct..."

These statutes, when considered together, require that the specific victims be identified and the amount of individual losses be specified. In United States v. Hill, 798 F.2d 402 (10th Cir. 1986), the Court held that the district court's failure to make adequate findings on the restitution issue required that the case be remanded so that such findings could be made. Implicit in that decision is the requirement that individual victims be identified and amounts owed to them be specified. This interpretation is consistent with the mandate for restitution described in 18 U.S.C. § 3663 (a)(1). That statute provides in part:

> The court when sentencing a defendant convicted of an offense...may order, in addition to...any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

The application of a formula precludes a determination of who the individual victim is, and especially so a formula that is not based on a statistically valid sample.

The application of a formula to determine restitution is not consistent with the overall construction of these statutes. The trial court committed error in applying a formula to resolve this issue. The 10th Circuit Court of Appeals affirmed this district court's order.

The Supreme Court should reverse the restitution order and remand the case to the district court and require that restitution amounts for individual victims be determined, or in the alternative restitution determined from a formula that is statistically valid, non-skewed and devised by a neutral party; and is one that is based on a random sampling of all patient visits, not just the visits that the Petitioner was convicted of.

If this type of formula is employed, one that considers a cross-section of all patients' charts, then the Petitioner suspects that the Court will find that **THERE WILL BE NO ADDITIONAL RESTITUTION DUE ASIDE FROM THE COUNTS ON WHICH THE PETITIONER WAS CONVICTED**, since a random non-bias statistically valid sample will demonstrate that there was **NO FRAUD** in the Petitioner's practice.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and opinion of the Tenth Circuit Court of Appeals in this matter;

Or in the alternative if this Court elects not to address the issues presented in this writ at the present time, it is requested that the writ issue

and that the matter be remanded to the Tenth Circuit Court of Appeals for redetermination.

Dated: _____

Respectfully submitted,

_____
ROBERT CHARLES DAVIS M.D.
In Pro Se

PUBLISHED

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
JUL 26 1995
PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 93-4192 & 94 4147
	)	
ROBERT CHARLES DAVIS,	)	
	)	
Defendant-Appellant.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 92-CR-211-W)

G. Fred Metos (Stephen R. McCaughey with him on the brief), Salt Lake City, Utah, for Defendant-Appellant.

Stanley H. Olsen (Scott M. Matheson, Jr., United States Attorney, and Barbara Bearnson, Assistant United States Attorney, with him on the brief), Assistant United States Attorney, Salt Lake City, Utah, for Plaintiff-Appellee.

Before TACHA, BRORBY and HENRY, Circuit Judges.

BRORBY, Circuit Judge.

Defendant-Appellant Dr. Robert Charles Davis appeals his convictions for filing false claims with the United States and for mail fraud as well as the district court's order of restitution. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm in part and remand in part.

BACKGROUND

A federal grand jury for the District of Utah issued a forty-one count indictment against Dr. Davis, a medical doctor, charging him with filing false claims and mail fraud in violation of 18 U.S.C. and 18 U.S.C. respectively. The government's theory at trial regarding the false claims charges related to bills Dr. Davis sent to the Medicaid program for reimbursement for work performed after he had been suspended from that program. Those bills were submitted under the names of other doctors. The mail fraud charges alleged Dr. Davis had engaged in a scheme to defraud patients by utilizing unlawful billing practices, and that he furthered this scheme with the use of the United States mails.

Dr. Davis was convinced on thirty-three counts, and he was thereafter sentenced to fifty-six months imprisonment and three years of supervised release, along with a $50,000 fine. Pursuant to 18 U.S.C. §§ 3663-3664, the district court also ordered him to pay approximately $158,000.00 in restitution to his various victims.

Dr. Davis then filed a motion for a new trial asserting, inter alia, the district court erred in refusing to hold a hearing to determine if any jurors failed to disclose pertinent information during voir dire and to determine if any jurors were improperly exposed to extraneous prejudicial information during the trial. The district court denied the motion, concluding it "rest[ed] on wisps of smoke that disappear in the light of reason."

On appeal, Dr. Davis argues the district court erred in denying his motion for a new trial, relying primarily on his two claims of juror misconduct. He also asserts the district court erred in admitting habit evidence pursuant to Fed. R. Evid. 406 and in prohibiting him from offering evidence to rebut the government's habit evidence. Finally, he alleges the district court erred in using a formula to calculate the amount of restitution he should pay. We address each of these claims in turn.

DISCUSSION

I.

Dr. Davis' first argument relates to two of the jurors' alleged failure to provide candid response to questions posed during voir dir. See, e.g., McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984) ("We hold that to obtain a new trial in such a situation [in a civil case], a party must first question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause."); United States v. Cattle King Packing Co., 793 F.2d 232, 243 (10th Cir.) (applying the two-part McDonough test in a criminal case), cert. denied, 479 U.S. 985 (1986). Specifically, he contends one juror failed to disclose that the juror's grandson was a patient of Dr. Davis and that the grandson owed Dr. Davis money for services rendered. He also contends a different juror failed to disclose knowledge of account and medical billing procedures. Deficiencies with the record on appeal, however, preclude us from reaching the merits of this claim.

The appellant, as the party claiming the district court erred, bears the "responsibility to order and provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised on appeal" 10th Cir. R. 10.1.1; see also United States v. Vasquez, 985 F.2d 491, 495 (10th Cir. 1993) ("The appellant is responsible for insuring that all materials on which he seeks to rely are part of the record on appeal"). "When the appellant asserts that his conviction should be reversed because of a particular error, and the record does not permit...us to evaluate the claim, we will generally refuse to consider it." Vasquez, 9885 F.2d at 495 (citing Tenth Circuit cases).

In this case, as in Vasquez, relevant portions of the transcript of the trial proceedings are not part of the record on appeal. "In the absence of a transcript...the Court of Appeals will not review an issue, even for plain error." Vasquez, 985 F.2d at 495. This rule is grounded in the impracticalities

of attempting to conduct meaningful appellate review of fact-intensive issues in the absence of a trail transcript. Without the transcript, we simply cannot substantiate the representations in the briefs regarding what questions were posed during voir dir and what the jurors' answers were. As a result, we cannot determine whether Dr. Davis has in fact made the requisite showing required by McDonough.

Furthermore, the failure to include the appropriate transcripts in the record on appeal constitutes a violation of 10th Cir. R. 10.1.1, which states "[t}transcripts should omit the examination of the jurors unless specifically drawn into issue on appeal." (Emphasis added). Thus, when the examination of jurors is an issue on appeal, the portion of the transcript containing the examination of the jurors must be included in the record on appeal. Due to these deficiencies with the record on appeal, "We must defer to the trial court's decisions." Moore v. Subaru of America, 891 F.2d 1445, 1448 (10th Cir. 1989). Therefore, we affirm that portion of the district court's order denying relief on the basis of the jurors' alleged failure to disclose information during voir dire.

Similarly, Dr. Davis' second and third claims of error, which relate to various evidentiary rulings by the district court, are also unreviewable on appeal because of the failure to include the relevant portions of the trial transcript in the record on appeal. We have stated "[t]he failure to file a transcript...precludes review of the trial court's evidentiary rulings. Challenges to the admission of evidence will not be considered by the Court of Appeals in the absence of a record containing those portions of the transcript on which the appellant relies." Vasquez, 985 F.2d at 495.

Moreover, the failure to provide the trial transcript runs afoul of 10th Cir. R. 28.2(d). That rule, which applies to any "act or ruling for which a party must record an objection to preserve the right to appeal," requires "a statement as to where a proper objection and the court's ruling thereon may be found in the record." 10th Cir. R. 28.2(d). Without the relevant portions of the trial

transcript, we have no way of knowing whether the issue was even preserved for appellate review. [1]

II.

Dr. Davis next asserts several jurors were improperly exposed to extraneous prejudicial information during the trial. In support of this motion for a new trial on this ground, he submitted an affidavit from a "trial research and jury consultant" who conducted a post-verdict interview with several of the jurors in this case. The relevant portion of the affidavit with respect to this claim is a statement by the affiant that one juror told her "[t]here was somebody in the courtroom who was drawing. A lot of jurors muted the TV to see who was drawn." Because of the presence of the sketch artist, several jurors allegedly watched television news reports to see who had been drawn, although they did so with the sound of the television muted. It is undisputed that this behavior directly contravened the district court's admonitions to the jurors regarding their duty to avoid any out-of-court publicity relative to the trial.

Dr. Davis asserts the district court erred by refusing to order a new trial based on this conduct by the jurors. He further contends these broadcasts were prejudicial because of the bulletins and statements accompanying the broadcasts, which

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[1] The present case provides an illustrative example of the rationale behind Rule 28.2(d). The government contends these evidentiary issues were not even preserved for appellate review while Dr. Davis claims a satisfactory objection was made before the district court. In the absence of compliance with Rule 28.2(d), we cannot verify these contentions one way or the other. Because it is the appellant's burden to create an adequate record that party bears the consequences of failing to provide a complete record on appeal.

contained information that was not otherwise admissible at trial.[2]

"We review the denial of a motion for a new trial based upon juror misconduct for an abuse of discretion." United States v. Simpson, 950 F.2d 1519 (10th Cir. 1991) (citations and internal quotations omitted): United States v. Thompson, 908 F.2d 648, 650 (10th Cir. 1990). Before reaching the merits of this issue, we must first determine whether Dr. Davis was entitled to a hearing on this claim. We conclude the district court did not abuse its discretion in denying the request for a hearing.

A.

While a juror "may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention," a juror "may not testify as to...the effect of anything...concerning the juror's mental processes in connection therewith." Fed. R. Evid. 606(b). See generally Tanner v. United States, 483 U.S. 107, 117-27 (1987) (discussing the common-law history of Rule 606(b) and the policies underlying it). As we observed in Simpson, the dichotomy established by Rule 606(b) permits a juror to testify (either literally or by way of affidavit) ont eh question of "whether any extraneous prejudicial information was improperly brought to bear upon a juror...[but] a juror may not testify as to the effect the outside information had upon the juror." Simpson, 950 F.2d at 1521 (emphasis in original); see also Mattox v. United States, 146 U.S. 140, 149 (1892) (recognizing a distinction between affidavits bearing on "the motives and influences" of the jurors, which are inadmissable to impeach the verdict, and affidavits bearing on the "existence of any extraneous influence," which are admissible).

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[2] Some of the bulletins accompanying the broadcasts stated "Pleaded No Contest to Medical Fraud," "License Suspended for Three Months," "Insurance Fraud," and "Sexual Misconduct." None of this evidence was admitted at trial. Cf. United States v. Greschner, 802 F.2d 373, 380-81 (10th Cir. 1986) (holding that while jurors were improperly exposed to a newspaper article, the contents of the article "had already been admitted in evidence"), cert, denied, 480 U.S. 908 (1987).

In *Simpson*, as in this case, the defendant requested a hearing on his claim of juror misconduct, but the district court denied the request. On appeal, we affirmed this ruling, concluding that under Rule 606(b), "it would have been an exercise in futility for the trial court to conduct an evidentiary hearing." *Simpson*, 950 F.2d at 1521. Once the fact of potential misconduct was brought to the district court's attention, we concluded further questioning of the juror at a hearing as to the effect of that misconduct was precluded by Rule 606(b). *Id.*; *see also United States v. Hornung*, 848 F.2d 1040, 1045 (10th Cir. 1988) (under Rule 606(b), questioning of a juror who has been exposed to extraneous information "is limited to the circumstances of the improper contact" and questions bearing on the effect of the contact on the juror's decision-making" are prohibited), *cert. denied*, 489 U.S. 1069 (1989). In accordance with *Simpson*, and for the reasons set forth below, we conclude it was not an abuse of discretion to deny the request for a hearing in this case.

We acknowledge our prior statement that the "proper remedy" under these circumstances is for the district court to hold a hearing. See *Hornung*, 848 F.2d at 1045. But while a hearing might be prudent or otherwise appropriate, we have never held it was absolutely mandatory, and we decline to so hold today. *Cf. Brecheen v. Reynolds*, 41 F.3d 1343, 1362 (10th Cir. 1994) ("[T]here is no absolute right to an evidentiary hearing in every case involving a claim of ineffective assistance of counsel."), *cert. denied*, ____ S.Ct. ____, 1995 WL 251885 (1995).

In reviewing allegations that a juror was improperly exposed to extraneous information, the district judge who presided over the trial is "uniquely able" to assess the relative severity of the allegations. *See Mayhue v. St. Francis Hosp. of Wichita, Inc.*, 969 F.2d 919, 922 (10th Cir. 1992). Because the district judge is in the best position to determine whether a hearing is necessary to evaluate such claims, the district judge should make the initial determination of whether a hearing would be of assistance to it in resolving this claim. Furthermore, we see no principled reason to treat

requests for a hearing concerning this type of allegation differently from similar situations where we have held that the district judges have the discretion to grant or deny a hearing. We therefore conclude the decision whether to grant or deny a hearing on a claim that a juror was exposed to extraneous information is vested in broad discretion of the district courts, and we will review the denial of a request for such a hearing only for an abuse of discretion. *See, e.g., Cramer v. United States*, 47 F.3d 379, 382 1995) (" 'The decision to rely upon affidavits and the record of a case rather than conduct an evidentiary hearing on a fee petition is ... reviewed for an abuse of discretion.' ") (quoting *Hamner v. Rios*, 769 F.2d 1404, 1406 (9th Cir. 1985)); *accord United States v. Whalen*, 976 F.2d 1346, 1348 (10th Cir. 1992) (denial of request for an evidentiary hearing in a § 2255 proceeding reviewed for an abuse of discretion); *United States v. Gines*, 964 F.2d 972, 977 (10th Cir. 1992) ("The standard of review for denial of an evidentiary hearing is abuse of discretion."), *cert. denied*, 113 S. Ct. 1023 (1993).

Applying these principles here, we conclude the district court did not abuse its discretion in denying Dr. Davis' request for a hearing. The affidavit attached to the motion for a new trial provided the district court with notice of potential juror misconduct in this case and the nature of the alleged improper contact (*i.e.*, exposure to extraneous information). Notice to the court of that concededly improper conduct by the juror or jurors was entirely proper under Rule 606(b), and it was sufficient in this case to trigger an analysis by the district court of the merits *vel non* of the issue. At that point, however, a hearing to examine jurors to determine if they were exposed to such information would, as we observed in *Simpson*, simply be redundant and unnecessary. Furthermore, a hearing on this issue could not be used to delve into the possible subjective effect any exposure might have had on the jurors' deliberations because of the prohibition in Rule 606(b). Accordingly, we find no abuse of discretion in the district court's request for a hearing.

B.

Although the district court did not err in refusing to hold an evidentiary hearing, this does not end the analysis. Regardless of whether a hearing is held, the district court must still determine whether any exposure to the extraneous information impermissibly tainted the jurors so as to warrant a new trial.[3]

In addressing the possible impact on the jurors of any exposure to extraneous material, the district court first noted that the foundation for Dr. Davis' motion was "based almost entirely on inadmissible hearsay," and, in several instances, constituted multiple hearsay. Because of those concerns, the court indicated it "seriously considered" denying the motion on the ground that it was not supported by "any competent evidence." But due to "the seriousness of the rights at issue ... and in an abundance of caution," the court declined to rule the affidavit was inadmissible.

As a threshold matter, it cannot be doubted that the district court had discretion to refuse to accept the contents of the affidavit, which was executed by a hired jury consultant, because it contained the hearsay statements by the consultant as to what she was told by the jurors. Unlike cases where a party provides the affidavit of the juror directly (after requesting permission from the district judge), *e.g.*, *Hornung*, 848 F.2d at 1043, the affidavit here is from a jury consultant, who was hired by the defense for the purpose of reaching a result favorable to the defendant. Under these circumstances, the district court's concerns over the veracity of the contents of this affidavit

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[3] We have previously recognized the "special problem" of determining the prejudicial impact of a particular extraneous influence in light of Rule 606 (b)is prohibition against receiving testimony from the jurors as to the subjective effects of such influences. *See United States v. Scisum*, 32 F.3d 1479, 1483 (10th Cir. 1994) (quoting *Mayhue*, 969 F.2d at 923). While we remain sensitive to this problem, it cannot and does not relieve the district courts of their obligation to make a determination of whether relief is warranted because of the exposure.

cannot be doubted. If the district court had refused to accept this affidavit because of these concerns over its contents, we would review that decision for an abuse of discretion. *See United States v. Jones*, 44 F.3d 860, 873 (10th Cir. 1995). But, while the district judge expressed concerns over the reliability of the allegations in the affidavit, it never ruled the affidavit was inadmissible. Instead, it addressed the merits of this claim after expressly "assuming the accuracy of th[e] information [contained in the affidavit]." On the basis of that assumption, the court concluded the allegations of misconduct were not sufficiently prejudicial as compared to other cases[4], and that no "further inquiry or a new trial" was warranted. We conclude, however, that once the district court assumed the veracity of the affidavit, the remainder of its analysis did not comport with our existing case law.

"The law in the Tenth Circuit is clear. A rebuttable presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court's instructions." *Mayhue*, 969 F.2d at 922 (citing *Hornung*, 848 F.2d at 1044-45). "The presumption of prejudice 'is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.'" *Hornung*, 848 F.2d at 1044 (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)). In order to conclude the exposure was harmless, in the context of this direct appeal, "we must ask ourselves whether we can 'declare a belief that [the error] was harmless beyond a reasonable doubt.'" *Thompson*, 908 F.2d at 653 (quoting *Chapman v. California*, 386 U.S. 18 24 (1967)). We have recognized that the most common means of demonstrating the harmlessness of an extraneous contact is to show the existence of "overwhelming evidence of [the] defendant's guilt."

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[4] *See, e.g., Mayhue*, 969 F.2d at 922-26 (jurors improperly considered dictionary definitions of certain terms after-trial court had excluded the dictionary as evidence); *Thompson*, 908 F.2d at 650-53 (jurors seen reading newspaper article containing prejudicial information about the defendant).

Hornung, 848 F.2d at 1045; *see also Thompson*, 908 F.2d at 653.

In this case, the district court concluded Dr. Davis failed to demonstrate sufficient prejudice from the jurors' exposure to this information to warrant relief. But under Maybue, Dr. Davis was entitled to rely on a presumption of prejudice which, in the absence of any countervailing evidence of harmlessness offered by the government, would be sufficient to support post-trial relief. Because the district court's analysis did not afford Dr. Davis the presumption of prejudice recognized by our cases, and because the record on appeal does not permit us to make an independent determination of whether the jury's exposure to this material was harmless, a remand is necessary to provide the district court with an opportunity to make appropriate findings, consistent with the framework enunciated above, for analyzing this issue.[5]

III.

Dr. Davis' final claim on appeal relates to the district court's restitution order. He phrases the issue on appeal as "whether a formula may be used to determine restitution," and he limits his argument to the legal issue of the propriety of using a formula, while expressly foregoing any challenge to the district court's factual findings

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[5] In so ruling, we do not mean to imply the district court must hold an evidentiary hearing on remand. To the contrary, we have already determined it was not an abuse of discretion to refuse to hold a hearing. Of course, we also do not seek to preclude the district court from holding a hearing if it believes a hearing would facilitate disposition of this matter. The decision of how to address this matter on remand is simply left to the district court in the first instance.

or the application of the formula to those findings of fact.[6] Finding no error, we reject this claim.

"The determination of an appropriate restitution amount is by nature an inexact science." *United States v. Brewer*, 983 F.2d 181, 185 (10th Cir.) (citation and internal quotations omitted), *cert. denied*, 113 S. Ct. 2348 (1993). In cases like this, where the "precise amount" of restitution owed is "difficult to determine," U.S.S.G. §5E1.1 "authorizes the court to reach an expeditious, reasonable determination of appropriate restitution by resolving uncertainties with a view toward achieving fairness to the victim."' U.S.S.G. §5E1.1, comment. (backg'd.) This commentary to the sentencing guidelines, which must be given authoritative weight unless shown to be inconsistent with federal law or otherwise plainly erroneous, see *Stinson v. United States*, 113 S. Ct. 1913, 1918-19 (1993); *United States v. Okane*, 52 F.3d 828, 833-34 n.5 (10th Cir. 1995), suggests that where the amount of restitution cannot easily be calculated, the touchstone inquiry is whether the amount of restitution ordered was "reasonable."

Dr. Davis does not challenge the amount of restitution ordered by the court as unreasonable, nor has he cited any cases prohibiting reliance on a formula in calculating an appropriate restitution order. In fact, the Ninth Circuit has rejected the precise argument advanced here, namely, that reliance on a formula in calculating the amount of restitution is per se impermissible. *See United States v. Soderling*, 970 F.2d 529, 534 n.11 (9th Cir. 1992) ("[T]he restitution order entered by the district court is not unlawful because it used a

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[6] Because Dr. Davis does not challenge the district court's factual findings relative to the restitution order, we find his reliance on *United States v. Hill*, 798 F.2d 402 (10th Cir. 1986) misplaced. In *Hill*, we concluded the record was "void of any factual determinations" by the district court other than a conclusory statement as to the total amount of restitution and on that basis, we remanded the case to the district court. *Id.* at 407. In this case, however, it is undisputed the district court made specific findings of fact as to how much restitution was owed to the victims, thereby distinguishing *Hill*.

formula ... to set the amount of restitution."), *cert. denied*, 113 S. Ct. 2446 with this statement, and accordingly, find no error in the district court's reliance on a formula in fashioning an appropriate restitution order.

CONCLUSION

We **AFFIRM** the district court's order denying the motion for a new trial with respect to the voir dire issue and the two evidentiary matters, and we **AFFIRM** the order of restitution. We **REMAND** the case, however, to permit the district court to make appropriate findings on the question of whether the jurors, exposure to extraneous information was harmless.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff - Appellee,	)	
	)	Nos. 93-4192
v.	)	94-4147
	)	
ROBERT CHARLES DAVIS,	)	
	)	
Defendant - Appellant.	)	

ORDER
Entered August 31, 1995

Before TACHA, BRORBY and HENRY, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned appeals.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk

By: /S/
Deputy Clerk

Appendix B

FIFTH AMENDMENT TO THE

UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TENTH CIRCUIT RULE 10.1.1

10.1.1 **Appropriate transcripts.** It is the appellant's responsibility to order and provide all portions of the transcript necessary to give the court of appeals a complete and accurate record of the proceedings insofar as such proceedings relate to the issues raised on appeal, and when sufficiency of the evidence is raised, the entire trial transcript ordinarily should be provided. However, there will other occasions when a transcript is unnecessary for resolution of the issues raised, or when a partial transcript is sufficient. In those instances only the relevant positions, if any, of the transcript should be ordered and provided. Counsel should endeavor to enter into stipulations that will avoid or reduce transcripts. Transcripts should omit the examination of jurors unless specifically drawn into issue on appeal. If no transcript is to be ordered, the appellant shall file a certification to that effect in this court within 10 days of filing the notice of appeal, and shall serve a copy of the certification on the appellee and the district court clerk.

TENTH CIRCUIT RULE 28.2. Additional requirements

In addition to all other requirements of the Federal Rules of Appellate Procedure and these rules, the parties shall include in all file and service copies of their initial briefs:

(a) appended to the tale of cases, a list of all prior or related appeals, with appropriate citations, or an express statement that there are no prior or related appeals;

(b) before discussion of each issue in the argument portion of the brief, a statement of the applicable standard of review;

(c) with respect to each issue raised on appeal, a statement as to where in the record the issue raised on appeal, a statement as to where in the record the issue was raised and ruled upon;

(d) if the appeal is based upon failure to admit or exclude evidence, or the giving or refusal to give a particular jury instruction, or any other act or ruling for which a party must record an objection to preserve the right to appeal, a statement as to where a proper objection and the court's ruling thereon may be found in the record;

(e) in appellant's brief only, copies of all pertinent written findings, conclusions, opinions or orders of a district judge, bankruptcy judge, and magistrate judge, or, if oral, a copy of the transcript pages;

(f) on the front cover of the brief, a statement as to whether oral argument is desired and, if oral argument is desired, following the conclusion stating the relief sought, a statement of the reason oral argument is necessary.

STEPHEN R. McCAUGHEY- 2149
Attorney for Defendant/Appellant
10 West Broadway, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 364-6474

G. FRED METOS - 2250
Attorney for Defendant/Appellant
10 West Broadway, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 364-6474

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee,	PETITION FOR REHEARING
v.	
ROBERT CHARLES DAVIS, Defendant/Appellant.	Case No. 93-4192 94-4147

The appellant, Robert C. Davis, by and through his attorneys of record G. Fred Metos and Stephen R. McCaughey, hereby petitions this court for a rehearing of Part I of the court's decision in the above-entitled case. In support thereof, appellant urges;

1. The court refused to reach the merits of the issues in Points I.A.,II and III of appellant's opening brief. The basis for this courts ruling was that appellant had failed to provide a transcript of the trial proceedings related to those issues. Those issues related to the lack of truthful answers by prospective jurors during the voir dire process and issues related to the admission and exclusion of evidence.

2. Transcripts of all trial proceedings were ordered pursuant to Rule 10.1.1 of the Rules of Practice of the United States Court of Appeals for the Tenth Circuit on a form that was provided by the court. Transcripts of all trial proceedings from

April 7, 1993, to May 7, 1993, were ordered and prepared and filed with the court. The jury selection in the District Court began on April 7, 1993. (Docket entry 108). That process continued through April 8, 1993. (Docket entry 109).

3. The relevant portions of the transcript relating to the issue briefed in Point I.A. of appellant's opening brief were directly quoted in the trial court's ruling on appellant's motion for a new trial. (Docket entry 172 at pgs. 1 1-12, and 18-19). The portions of the transcript quoted in that decision were sufficient to provide the basis for appellate review of the issue related to the errors in the jury selection process raised in Point 1.A. of appellant's opening brief.

Wherefore, appellant prays that this court review and address the merits of those issues raised in Points I.A., II and III of appellant's opening brief. Appellant concedes that these issues have been fully briefed and argued before this court and further briefing and argument is not necessary.

DATED this 8th day of August, 1995.

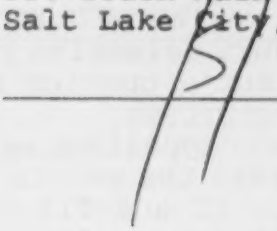
/S/

STEPHEN R. McCAUGHEY
Attorney for
Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was mailed/hand delivered on this 8th day of August, 1995, to:

Stanley H. Olsen
Assistant United States
Attorney
478 U.S. Courthouse
350 South Main Street
Salt Lake City, UT 84101



TENTH CIRCUIT RULE 40.4 Successive petitions

The Court will accept only one petition for rehearing from any party to an appeal and, regardless of the nature or substance of the motion, will not accept any motion to reconsider the court's ruling on a petition for rehearing.

Appendix G

DIRECTIONS FOR COMPLETING THIS FORM ARE ON THE REVERSE SIDE

PART I - To be completed by appellant within ten days of filing the notice of appeal.

Short Title: USA v. Davis District: Utah
Dist. Court No.: 92-CR-211 Circuit Court No. 93-4192

Name of Attorney : G. Fred Metos & Stephen R. McCaughey
Name of Law Firm: McCaughey & Metos
Address of Firm: 72 East 400 South - Ste. 330
Phone No. of Firm: (801) 364-6474
Attorneys for: Defendant
Name of Court Reporter: Ray Fenlon
Phone No. of Reporter: (801) 322-0702

PART II - COMPLETE SECTION A OR SECTION B

SECTION A - I HAVE NOT ORDERED A TRANSCRIPT BECAUSE:

[] A transcript is not necessary for this appeal, or

[] The necessary transcript is already on file in District Court

[] The necessary transcript was ordered previously in appeal no._____

SECTION B - I HEREBY ORDER THE FOLLOWING TRANSCRIPT: (Specify the date and proceeding in the space below)

Motions Hearings: 3/24/93; 4/2/93; 5/19/93; 6/14/93;
Jury Trial: 4/7/93 to 5/7/93
Sentencing Proceedings: 10/18/93

[x] Appellant will pay the cost of the transcript. My signature on this form constitutes my agreement to pay for the transcripts ordered on this form.

[ ] This case is proceeding under the Criminal Justice Act.

NOTE: Leave to proceed in forma pauperis does not entitle appellant to a free transcript. An order of the District court allowing payment for the transcript at government expense must be obtained. See 28 U.S.C. Section 753(f).

CERTIFICATE OF COMPLIANCE

I certify that I have read the instructions on the reverse of this form and that copies of this transcript order form have been served on the court report (if transcript ordered), the Clerk of the U.S. District Court, all counsel of record or pro se parties, and the Clerk of the U.S. Court of Appeals for the Tenth Circuit. I further certify that satisfactory arrangements for payment for any transcript ordered have been made with the court reporter(s).

Signature of Attorney/~~Pro se~~: /S/ Date 10/25/93

PART III - TO BE COMPLETED BY THE COURT REPORTER

Upon completion, please file one copy with the Clerk of the U.S. court of Appeals and one copy with the Clerk of the U.S. District Court.

Date arrangements for payment completed: _____
Estimated completion date: _____
Estimated number of pages: _____

I certify that I have read the instruction on the reverse side and that adequate arrangements for payment have been made.

Signature of Court Report: _____ Date: _____

DIRECTIONS FOR USING THIS FORM

This form requires multiple distribution, service and filing. The responsibilities of each party and the court reporter are described below.

1. APPELLANT

Whether of not a transcript is ordered, appellant or his counsel must complete Part I and Part II of this form. Upon completion, appellant must serve a copy on:

a. the Court Reporter (if a transcript is ordered),
b. all parties,
c. the Clerk of the U.S. District Court, and
d. the Clerk of the U.S. Court of Appeals.

If a transcript is ordered, the appellant must obtain execution of this form by the court report(s) who recorded the proceedings. Within the ten day period allowed for ordered the transcript under Fed. R. App. P. 10(b)(1), appellant must make adequate arrangements for payment for the transcript. The Court Reporter may require a deposit equal to the full estimated cost of the transcript. 28 U.S.C. §753(f).

Unless the entire transcript is ordered, appellant shall serve on all appellees a statement of the issues he intends to present on appeal. Fed. R. App. P. 10(b)(3). The Docketing Statement required by 10th Cir. R. 3.4 fulfills this requirement.

Those portions of the transcripts that are filed that are pertinent to the appeal must be designated for inclusion in the record on appeal. 10th Cir. R. 10.2.1, 10.2.3 and 10.2.5.

2. APPELLEE

Unless the entire transcript is ordered, appellee may, within twenty days of filing of the notice of appeal, file and serve on appellant a designation of additional transcript to be included. If, within ten days, appellant does not order and pay for the transcript so designated, appellee may, within a further ten days, order and pay for the transcript or move in the district court for an order compelling appellant to do so. Fed. R. App. P. 10(b)(3).

3. COURT REPORTER

After receipt of this form and after satisfactory financial arrangements have been made. The court reporter shall certify the date of the transcript was ordered and estimate the date it will be completed. The estimated completion date must comply with the Tenth Circuit Judicial Council's mandated district court Court Reporter Management Plans. Transcripts in a criminal case (includes 28 U.S.C. §§2241, 2254, 2255) shall be filed within 30 days of the date arrangements for payment are made. Transcripts in a civil case shall be filed within 60 days of the date arrangements for payment are made. Court Reporters are subject to a mandatory fee reduction if transcripts are not timely filed. See Appellate Transcript Management Plan for the Tenth Circuit, 10th Cir. R., App. B.

The completed form must be served on:

a. the Clerk of the District Court and
b. the Clerk of the Court of Appeals.

DIRECTIONS FOR COMPLETING THIS FORM ARE ON THE REVERSE SIDE

PART I - To be completed by appellant within ten days of filing the notice of appeal

Short Title: USA v. Davis District: Utah
Dist. Court No.: 92-CR-211 Circuit Court No.

Name of Attorney : G. Fred Metos &
Name of Law Firm: McCaughey & Metos
Address of Firm: 10 W. Broadway, Ste. 650
Salt Lake City, Utah 84101
Phone No. of Firm: (801) 364-6474
Attorneys for: Defendant
Name of Court Reporter: Ray Fenlon
Phone No. of Reporter: (801) 322-0702

PART II - COMPLETE SECTION A OR SECTION B

SECTION A - I HAVE NOT ORDERED A TRANSCRIPT BECAUSE:

[] A transcript is not necessary for this appeal, or

[] The necessary transcript is already on file in District Court

[] The necessary transcript was ordered previously in appeal no._____

SECTION B - I HEREBY ORDER THE FOLLOWING TRANSCRIPT: (Specify the date and proceeding in the space below)

Hearing: January 31, 1994
Hearing: March 9, 1994

[x] Appellant will pay the cost of the transcript. My signature on this form constitutes my agreement to pay for the transcripts ordered on this form.

[ ] This case is proceeding under the Criminal Justice Act.

NOTE: Leave to proceed in forma pauperis does not entitle appellant to a free transcript. An order of the District court allowing payment for the transcript at government expense must be obtained. See 28 U.S.C. Section 753(f).

CERTIFICATE OF COMPLIANCE

I certify that I have read the instructions on the reverse of this form and that copies of this transcript order form have been served on the court report (if transcript ordered), the Clerk of the U.S. District Court, all counsel of record or pro se parties, and the Clerk of the U.S. Court of Appeals for the Tenth Circuit. I further certify that satisfactory arrangements for payment for any transcript ordered have been made with the court reporter(s).

Signature of Attorney/~~Pro se~~: /S/ Date 10/25/93
Fred G. Metos

PART III - TO BE COMPLETED BY THE COURT REPORTER

Upon completion, please file one copy with the Clerk of the U.S. court of Appeals and one copy with the Clerk of the U.S. District Court.

Date arrangements for payment completed: _____
Estimated completion date: _____
Estimated number of pages: _____

I certify that I have read the instruction on the reverse side and that adequate arrangements for payment have been made.

Signature of Court Report: _____ Date: [redacted]

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c. the Clerk of the U.S. District Court, and
d. the Clerk of the U.S. Court of Appeals.

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Unless the entire transcript is ordered, appellant shall serve on all appellees a statement of the issues he intends to present on appeal. Fed. R. App. P. 10(b)(3). The Docketing Statement required by 10th Cir. R. 3.4 fulfills this requirement.

Those portions of the transcripts that are filed that are pertinent to the appeal must be designated for inclusion in the record on appeal. 10th Cir. R. 10.2.1, 10.2.3 and 10.2.5.

2. APPELLEE

Unless the entire transcript is ordered, appellee may, within twenty days of filing of the notice of appeal, file and serve on appellant a designation of additional transcript to be included. If, within ten days, appellant does not order and pay for the transcript so designated, appellee may, within a further ten days, order and pay for the transcript or move in the district court for an order compelling appellant to do so. Fed. R. App. P. 10(b)(3).

3. COURT REPORTER

After receipt of this form and after satisfactory financial arrangements have been made. The court reporter shall certify the date of the transcript was ordered and estimate the date it will be completed. The estimated completion date must comply with the Tenth Circuit Judicial Council's mandated district court Court Reporter Management Plans. Transcripts in a criminal case (includes 28 U.S.C. §§2241, 2254, 2255) shall be filed within 30 days of the date arrangements for payment are made. Transcripts in a civil case shall be filed within 60 days of the date arrangements for payment are made. Court Reporters are subject to a mandatory fee reduction if transcripts are not timely filed. See Appellate Transcript Management Plan for the Tenth Circuit, 10th Cir. R., App. B.

The completed form must be served on:

a. the Clerk of the District Court and
b. the Clerk of the Court of Appeals.

SEPTEMBER 11, 1995

RAYMOND P. FENLON, CSR
350 SOUTH MAIN STREET, #100
SALT LAKE CITY, UTAH 84101

ROBERT DAVIS
REG. NO. 04160-081
3600 GUARD ROAD
LOMPAC, CALIFORNIA 93436

RE: TRANSCRIPTS ORDERED ON APPEAL IN U.S.A. VS. ROBERT DAVIS, NO. 92-CR-211W

DEAR MR. DAVIS,

THIS IS TO INFORM YOU THAT I HAVE TRANSCRIBED ALL OF THE HEARINGS CORRESPONDING TO THE DATES LISTED ON THE ATTACHED TRANSCRIPT ORDER FORM. THEY WERE ALL DELIVERED TO YOUR ATTORNEYS.

AS FAR AS WHAT WAS SENT TO THE TENTH CIRCUIT COURT OF APPEALS IN DENVER, I WOULD HAVE NO KNOWLEDGE OF THAT. I PERSONALLY DO NOT SEND TRANSCRIPTS TO THE COURT OF APPEALS. ONLY DELIVER THEM TO THE DISTRICT COURT OF UTAH, AND THE CLERK'S OFFICE (RON BLACK IS THE CURRENT APPEALS CLERK IN THE DISTRICT OF UTAH) WOULD DEAL DIRECTLY WITH THE TENTH CIRCUIT COURT OF APPEALS WITH REGARD TO TRANSCRIPTS TO BE SENT TO THEM.

I WOULD SUGGEST YOU COMMUNICATE WITH YOUR ATTORNEYS FOR FURTHER INFORMATION, OR THE APPEALS CLERK IN UTAH, OR THE TENTH CIRCUIT COURT OF APPEALS FOR THE INFORMATION YOU ARE SEEKING ON THIS MATTER.

SINCERELY,
RAYMOND P. FENLON, CSR

/s/

Appendix I

ROBERT CHARLES DAVIS
Reg. No. 04160-081
3600 Guard Road
Lompoc, California 93436
517-487-6727 (contact no.)

In Pro Se

IN THE UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. ROBERT CHARLES DAVIS, Defendant/Appellant.	PETITION FOR REHEARING IN BANC Case No. 93-4192 94-4147

The appellant, Robert C. Davis, in Pro Se hereby petitions this court for a rehearing of Part I of the court's decision in the above-entitled case.

STATEMENT OF FACTS

1). The defendant-Appellant Dr. Robert Charles Davis appealed his conviction on thirty-two counts before the Tenth Circuit Court of appeals.

2). On appeal the Defendant-Appellant argued that the district court erred in denying the Defendant/Appellant's motion for a new trial, relying primarily on his two claims of juror misconduct.

3). The Defendant/Appellant also argued that the district court erred in admitting habit evidence pursuant to Fed. R. Evid. 406 and in prohibiting him from offering evidence to rebut the government's habit evidence.

4). Finally the Defendant-Appellant alleged that the district court erred in using a formula to calculate the amount of restitution he should pay.

5). On July 26, 1995 the United States Court of Appeals Tenth Circuit reached a decision after oral arguments were heard before Circuit Judges Tacha, Brorby and Henry. Judge Brorby wrote the decision.

6). The Tenth Circuit Court of Appeals affirmed the district court's order denying the motion for new trial with respect to the voir dir issue and the two evidentiary matters, and affirmed the order of restitution.

7). The Tenth Circuit Court of Appeals remanded the case, however, to permit the district court to make appropriate findings on the question of whether the jurors' exposure to extraneous information was harmless.

8). In the matter of Tenth Circuit Court's affirmation of the district court's order denying the motion for new trial with respect to the voir dir issue and the two evidentiary matters, and the order of restitution, the Tenth Circuit found that the appellant did not provide relevant portions of the transcript of the trial proceedings as part of the appeal record.

9). The Tenth Circuit held that "In the absence of a transcript...the Court of Appeals will not review an issue, even for plain error," quoting United States v. Vasquez, 985 F.2d 491, 495. The court held that the appeal constituted a violation of 10th Cir. R. 10.1.1.

10). Furthermore the Tenth Circuit held that failure to provide the trial transcript runs afoul of 10th Cir. R. 28.2(d).

> "That rule, which applies to any 'act or ruling for which a party must record an objection to preserve the right to appeal,' requires a 'statement as to where a proper objection and the court's ruling thereon may be found in the record.' 10th Cir. R. 28.2(d).

Without the relevant portions of the trial transcript, we have no way of knowing whether the issue was even preserved for appellate review. Because we do not have the portions of the transcript demonstrated where a proper, contemporaneous objection was made, we cannot and will not, address these issues on appeal."

11). On August 8, 1995 the Defendant/Appellant through counsel filed a Petition for Rehearing. In that Petition the Defendant/Appellant argued the following:

a). Transcripts of all trial proceedings were ordered pursuant to Rule 10.1.1 of the Rules of Practice of the United States Court of Appeals for the Tenth Circuit on a form that was provided by the court. (Def. Exh. "A"). Transcripts or all trail proceedings from April 7, 1993, to May 7, 1993, were ordered and prepared and filed wit the court. The jury selection in the District Court began on April 7, 1993. (Docket entry 108). That process continued through April 8, 1993. (Docket entry 109).

b). The relevant portions of the transcript relating to the issue briefed in Point 1.A of appellant's opening brief were directly quoted in the trial court's ruling on appellant's motion for a new trial. (Docket entry 172 at pgs. 11-12, and 18-19). The portion of the transcript quoted in that decision were sufficient to provide the basis for appellate review of the issue related to the errors in the jury selection process raised in Point 1.A of appellant's opening brief.

12). On August 31, 1995 the Tenth Circuit Court of Appeals denied the Defendant/Appellant's Motion for Reconsideration.

ARGUMENT

1). Pursuant to Rule 35.1 the Defendant/Appellant is seeking in banc consideration. The Defendant/Appellant believes that

the issue presented before the entire court are of exceptional public importance.

2). The Defendant/Appellant petitions the Tenth Circuit Court of Appeals for in banc rehearing for the following reasons:

a). In toto consideration of all arguments presented by the Defendant/Appellant can lead to a reversal of the Defendant/Appellant's criminal conviction.

b). There is new case law that mirrors the Defendant/Appellant's arguments which holds that it is reversible error to exclude evidence of legitimate transactions in cases where the crucial issue is fraudulent intent.

c). The Defendant/Appellant will have served his entire sentence by the time he is able to have the case at bar heard by the court of last resort; or the Defendant/Appellant is able to proceed with and have heard a 28 U.S.C. Section 2255 Writ of Habeas Corpus for Ineffective Assistance of Counsel.

IN TOTO CONSIDERATION OF ALL ARGUMENTS MAY LEAD TO A REVERSAL OF JUDGMENT OF CONVICTION AS OPPOSED TO A REMAND ONLY N THE QUESTION OF WHETHER THE JURORS' EXPOSURE TO EXTRANEOUS INFORMATION WAS HARMLESS

1.) The Tenth Circuit Court of Appeals found that the "presumption of prejudice arises whenever a jury is exposed to external information in contravention of a district court's instructions," quoting Mayhue v. St. Francis Hosp. of Wichita, Inc., 969 F.2d 919 (19th Cir. 1992), and that "the presumption of prejudice is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant that such contact with the juror was harmless to the defendant," quoting United States v. Hornung, 848 F.2d 1040 at 1044 (10th Cir. 1988).

2). The Tenth Circuit also stated that under Mayhue, the Defendant/Appellant was entitled to rely

on a presumption of prejudice which, in the absence of any countervailing evidence of harmlessness offered by the government, would be sufficient to support post-trial relief. Because the district court's analyst did not afford the Defendant/Appellant the presumption of prejudice recognized by the Tenth Circuit's cases, and because the record on appeal did not permit the Tenth Circuit to make an independent determination of whether the jury's exposure to this material was harmless, a remand was necessary to provide the district court with an opportunity to make appropriate findings.

3). However, if the Tenth/Circuit were to also take into consideration the Defendant/Appellant's arguments claiming that it was error for the district court to deny the Defendant/Appellant motion for a new trial with respect to the voir dire issue and two evidentiary matters...then the consideration of the total pie, instead of just one piece ... could in toto logically lead to a reversal of criminal conviction.

4). The Defandant/Appellant,as counsel argued, submitted all transcripts which included: motions hearings (3/24/93; 4/2/93; 5/19/93; 6/14/93), jury trial-(4/7/93 thru 5/7/93) and sentencing proceedings (10.18/93). (Def.Exh."A"). In addition, if there was any question as to where the relevant transcipts relating to the issues that the Tenth Circuit would not consider, these were clarified in the Defendant/Appellant's Petition for Rehearing through counsel.

THERE IS NEW CASE LAW THAT MIRRORS THE DEFENDANT/APPELLANT'S ARGUMENTS WHICH HOLDS THAT IT IS REVERSIBLE ERROR TO EXCLUDE EVIDENCE OF LEGITIMATE TRANSACTION IN CASES WHERE THE CRUCIAL ISSUE IS FRAUDULENT INTENT

1.) In United States v. Thomas, 32 F.3d, 418 the Ninth Circuit Court of Appeals found that it was reversible error to exclude evidence of legitimate transactions in cases where the crucial issue is

fraudulent intent. (Def.Exh."B"). The Thomas case is a mirror image of the Defendant/Appellant's case.

2). Thomas is a case involving a fruit brokerage company that allegedly defrauded fruit growers of the best price for their fruit. The Ninth Circuit reversed the district court that restrict evidence to just "victims" of the alleged mailfraud scheme. (This is exactly what occurred in the case at bar.)

3). The critical issue in Thomas was whether the defendant "intended to defraud." The Ninth Circuit found that the trial court erred by barring direct evidence of "either the growers' receipt of benefits, or of their overall perceptions of the scheme. This was true despite the Government's argument that any evidence not related to the specific transactions identifed in the indictment was either irrelevant to or cumulative of the testimony of an accounting expert who was permitted to testify for the defense.

4). Similarily, barring evidence that the Defendant/Appellant conducted legitimate transactions prejudiced the Defendant/ Appellant by preventing the Defendant/Appellant from establishing that first admitting habit and routine evidence against the Defendant/Appellant (Point II of the Defendant/Appellant's Opening Brief) and then subsequently preventing the Defendant/Appellant from introducing rebuttal testimony to the Government's habit and custom evidence (Point II of Appellant's Opening Brief).

5). Thomas held that exclusion of testimony by clients (in the Defendant/Appellant's case employees and satisfied patients of the Defendant/Appellant who were satisfied with Thomas's service is reversible error.

6). The decision in Thomas is applicable to a decision that the Tenth Circuit may make. The Thomas case first came to the Defendant/Appellant's attention the last week of August 1995.

THE DEFENDANT/APPELLANT MAY SERVE HIS ENTIRE SENTENCE BY THE TIME THE DEFENDANT/APPELLANT CAN HAVE THIS MATTER REVIEWED IN ANOTHER FORUM

1). If the Tenth Circuit Court of Appeals does not hear the Defendant/Appellant's Petition for Rehearing in Banc, the Defendant/Appellant has two logistic options.

2). First, the Defendant/Appellant can file a petition for certiorari to the Supreme Court of the United States;

3). Or second, if the Defendant/Appellant does not prevail favorably before the district court with regards to the Tenth Circuit Court of Appeals remand on the question of whether the jurors' exposure to extraneous information was harmless--then the Defendant/Appellant can appeal the district court's ruling, while at the same time make a claim of ineffective assistance of counsel, stating that counsel failed to properly prepare the Defendant/ Appellant's Opening Brief claiming the Strickland standard (Strickland v. Washington 466 U.S. 668) that:

a). the counsel's assistance was unreasonable considering all the circumstances of the case, and

b). that "there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." Strickland

4). On November 19, 1993 the district court sentenced the Defendant/Appellant to 56 months incarceration. The Defendant/ Appellant's mandatory release date with goodtime is December 7, 1996. However, the Defendant/Appellant is enrolled and has nearly half-way completed a comprehensive 500 drug and alcohol program. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, specifically, amendments to 18 U.S.C. § 3621, Subtitle T, Substance Abuse Treatment in Federal Prisons, the Defendant/ Appellant has been deemed eligible for a one year reduction in his sentence and a six month halfway house (Def.Exh."C").

5). Taking this reduction of the Defendant/Appellant's sentence into consideration the Defendant will be released from incarceration to a halfway house on June 9, 1996.

6). Theoretically the Defendant/Appellant can win his appeal, either before the Supreme Court, or through a 28 U.S.C. § 2255 claim for ineffective assistance of counsel, and serve his entire sentence.

RELIEF

1). Rule 35.1 of the Tenth Circuit Court of Appeals provide for in banc consideration, whether upon intial hearing or rehearing is an extraordinary procedure intended to bring the attention of the entire court an issue of exceptional public importance.

2). In banc courts are convened only when extraordinary circumstances exist that call for the authoritative consideration and decision by a majority of the court. Accordingly, a hearing or rehearing in bane is not favored and ordinarily will not be ordered except when consideration by the full court is necessary to secure or maintain uniformity of decisions, or when the proceeding involves a question of exceptional importance.

3). In the Tenth Circuit Court of Appeals decision the Court stated that the Defendant/Appellant violated Rules 10.1.1 and 28.2 by not providing transcripts or pointing out relevant portions of the transcript relating to the issues briefed: and therefore affirmed the district court's order denying the motion for a new trial with respect to the voir dire issue and two evidentiary matters.

4). The Defendant/Appellant, subsequently in a Petition for Rehearing (Def.Exh."D") argued that the transcripts of all trial proceedings were filed with the court, including the jury selection process and that the relevant portion of the transcripts were directly quoted in the trial court's ruling on the Defendant/ Appellant motion for a new trial. Both the Defendant/Appellant's Opening Brief and

Petition for Rehearing were submitted and the case of the Defendant/Appellant's Opening Brief were argued by counsel.

5). The Defendant/Appellant is an innocently convicted man. The Defendant/Appellant believes that the in toto consideration of the Defendant/Appellant's Opening Brief and Oral Arguments, along with applicable case law such as Thomas--should lead to a reversal.

6). Anytime even one person spends a day in jail for a crime that he did not commit, it is one day too many. It would be a manifest injustice not to consider the Defendant/Appellant's Opening Brief and Oral Arguments in toto. It is a matter of exceptional public importance for the Tenth Circuit Court of Appeals to ensure that all citizens are given a fair day in court--and that due process is dispassionately and objectively administered based on the merits of the Defendant/Appellant's appeal.

7). The Defendant/Appellant has already been incarcerated for nearly two years, since November 1993. The Defendant/Appellant, believes that if the Tenth Circuit Court Of Appeals reconsiders the decision of the Appellate Panel, that the Court will reverse the Defendnat/Appellant's conviction.

8). The Defendant/Appellant humbly requests that the Tenth Circuit in Banc review and address the merits Of the Defendant/ Appellant's Opening Brief and Oral Arguments.

DATED the 6th day of September, 1995

/S/

ROBERT CHARLES DAVIS
In Pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have by first class postage prepaid mail sent a true and correct copy of the foregoing on September 6, 1995 to:

STEVEN R. McCAUGHEY
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

G. FRED METOS
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

STANLEY H. OLSEN
Assistant United States Attorney
478 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101

/S/
ROBERT CHARLES DAVIS

DIRECTIONS FOR COMPLETING THIS FORM ARE ON THE REVERSE SIDE

PART I - To be completed by appellant within ten days of filing the notice of appeal

Short Title: USA v. Davis
District: Utah
Dist. Court No.: 92-CR-211
Circuit Court No. 93-4192

Name of Attorney: G. Fred Metos & Stephen R. McCaughey
Name of Law Firm: McCaughey & Metos
Address of Firm: 72 East 400 South - Ste. 330
Phone No. of Firm: (801) 364-6474
Attorneys for: Defendant
Name of Court Reporter: Ray Fenlon
Phone No. of Reporter: (801) 322-0702

PART II - COMPLETE SECTION A OR SECTION B

SECTION A - I HAVE NOT ORDERED A TRANSCRIPT BECAUSE:

[] A transcript is not necessary for this appeal, or

[] The necessary transcript is already on file in District Court

[] The necessary transcript was ordered previously in appeal no._____

SECTION B - I HEREBY ORDER THE FOLLOWING TRANSCRIPT: (Specify the date and proceeding in the space below)

Motions Hearings: 3/24/93; 4/2/93; 5/19/93; 6/14/93;
Jury Trial: 4/7/93 to 5/7/93
Sentencing Proceedings: 10/18/93

[x] Appellant will pay the cost of the transcript. My signature on this form constitutes my agreement to pay for the transcripts ordered on this form.

[ ] This case is proceeding under the Criminal Justice Act.

NOTE: Leave to proceed in forma pauperis does not entitle appellant to a free transcript. An order of the District court allowing payment for the transcript at government expense must be obtained. See 28 U.S.C. Section 753(f).

CERTIFICATE OF COMPLIANCE

I certify that I have read the instructions on the reverse of this form and that copies of this transcript order form have been served on the court report (if transcript ordered), the Clerk of the U.S. District Court, all counsel of record or pro se parties, and the Clerk of the U.S. Court of Appeals for the Tenth Circuit. I further certify that satisfactory arrangements for payment for any transcript ordered have been made with the court reporter(s).

Signature of Attorney/~~Pro se~~: /S/ Date 10/25/93

PART III - TO BE COMPLETED BY THE COURT REPORTER

Upon completion, please file one copy with the Clerk of the U.S. court of Appeals and one copy with the Clerk of the U.S. District Court.

Date arrangements for payment completed: _____
Estimated completion date: _____
Estimated number of pages: _____

I certify that I have read the instruction on the reverse side and that adequate arrangements for payment have been made.

Signature of Court Report: _____ Date: _____

August 31, 1995

Robert Davis, M.D.
Reg. No. 04160-081
3600 Guard Road
Lompoc, California 93436
517-487-6727 (contact no.)

Circuit Judge Deanell Tacha
Circuit Judge Wade Brorby
Circuit Judge Henry
Tenth Circuit Court of Appeals
C-404 U.S. Courthouse
Denver, Colorado 80294

Re: United States of America v.
Robert Charles Davis
Petition for Rehearing
Case No. 93-4192, 94-4147

Subject: JUDICIAL NOTICE

Dear Honorable Judges:

Enclosed is a copy of a Ninth Circuit Case that may directly impact my appeal, which I was not aware of until this week. The case is copied in its entirety and is United States v. Thomas, 32 F.3d, 418.

This case is a mirror image of my case. In Thomas the Ninth Circuit found that it was reversible error to exclude evidence of legitimate transactions in cases where the crucial issue is fraudulent intent.

Thomas is a case involving a fruit brokerage company that allegedly defrauded fruit growers of the best price for their fruit. The Ninth Circuit-reversed the district court that restricted evidence to just "victims" of the alleged mail fraud scheme. (This is exactly what occurred in the case at bar.)

The critical issue in Thomas was whether the defendant "intended to defraud." The Ninth Circuit found that the trial court erred by barring direct

evidence of "either the growers' receipt of benefits, or of their overall perceptions of the scheme." This was true despite the Government's argument that any evidence not related to the specific transactions identified in the indictment was either irrelevant to or cumulative of the testimony of an accounting expert who was permitted to testify for the defense.

Similarly, barring evidence that Davis conducted legitimate transactions prejudiced Davis by preventing Davis from establishing that first admitting habit and routine evidence against Davis (Point II of Appellant's Opening Brief) and then subsequently preventing Davis from introducing rebuttal testimony to the Government's habit and custom evidence (Point II of Appellant's Opening Brief).

United States v. Thomas, 32 F. 3d, 418 held that excursion of testimony by clients (in Davis's case employees and satisfied patients) of the defendant who were satisfied with Thomas's services is reserversible error.

The decision in Thomas is applicable to a decision that the Tenth Circuit may make.

Thank you very much for your valuable time and consideration. I appreciate your review.

Sincerely,

Robert Davis M.D.

cc: Fred G. Metos
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

Stanley H. Olsen
Assistant United States Attorney
478 U.S. Courthouse
350 South Main Street
Salt Lake City, Utah 84101

U.S. v. THOMAS
Cite as 32 F.3d 418 (9th Cir. 1994)

Before: HUG. SCHROEDER, and FERNANDEZ, Circuit Judges.

SCHROEDER, Circuit Judge:

Michael Thomas appeals his conviction and sentence for twenty counts of mail fraud in violation of 18 U.S.C. §§ 371 and 1341. The alleged fraud occurred when the defendant reported false prices to his customers in the course of his produce marketing operations. We reverse and remand for a new trial, because we find that the district court erred in limiting the evidence that defendant was permitted to introduce on the key issue of intent to defraud.

I. BACKGROUND

In 1987 and 1988, Thomas was the marketing coordinator of produce packing and marketing company that brokered sales of fruit between fruit growers and retail merchants. His company, Christian Salvesen Packing and Marketing ("CSPM") endeavored to obtain the highest possible price for growers' fruit, and then remitted the proceeds to the growers after deducting its own percentage commission and other fixed costs.

In early July 1987, Thomas implemented what he termed as "averaging scheme" on behalf of CSPM. When fruit prices were low, CSPM would report an artificially high price to the growers, and contribute its own money to make up the difference. When prices were high, on the other hand, CSPM would report an artifically low price to the growers, and retain some of the proceeds for itself. Thomas asserted that he took "concrete steps" to make sure that no grower lost money from the scheme, and the uncontested accounting evidence showed that the growers came out ahead by approximately $175,980.

As a result of this scheme, Thomas was indicted for mail fraud in 1991. The superseding indictment charged that in 1987 and 1988, Thomas had

operated a "scheme to defraud" growers in violation of 18 U.S.C. §§ 371 and 1341 by misrepresenting the actual prices received for their fruit. The government contended that the scheme was intended to defraud the growers by taking money that was rightfully theirs.

The superseding indictment specifically described overpayments as well as underpayments as part of this fraudulent scheme. It alleged that by overpaying the growers in some instances, the defendant deprived the growers of knowledge of the exact price for which their product was sold, and "the opportunity to accurately evaluate the ability of CSPM... to sell their fruit of the highest possible price." However, the mail fraud counts set forth to the indictment included only mailings of underpayments.

[1] In a mail fraud prosecution the government must prove beyond a reasonable doubt (1) that a defendant devised "any scheme or artifice to defraud," and (2) that the defendant used the mails or caused the mails to be used in furtherance of the scheme. *United States v. Dadanian*, 818 F.2d 1443 (9th Cir. 1987), *modified on rehearing*, 856 F.2d 1391 (9th Cir. 1988); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert, denied*, 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). In this case, the principal issue at trial was whether the scheme that Thomas had devised was on "intended to defraud." It is important in this case that at the time of defendant's actions, a deprivation of honest services and fair dealing did not constitute a mail fraud offense; rather, the defendant must have intended to deprive his victims of money or property. *See McNanny v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987),

overruled by statute, 18 U.S.C. § 1346 (Supp. 1994).

The defendant maintained at trial that the purpose of the system was not to defraud the growers of money, but to even out fluctuating crop prices in order to assuage grower discontent. To rebut the government's evidence of intent, the defendant wished to elicit testimony from individual growers regarding their business dealings with CSPM and their reactions to the averaging scheme, and to submit evidence that the growers actually came out ahead as a result of the scheme. The district court, however, limited the defendant's evidence of intent to the expert testimony of one accountant, who testified that the specific growers the government had named in its indictment had received overpayments as well as underpayments, and that during the years in question those growers had in fact come out ahead by more than $175,000 as a result of the erroneous reporting.

Defendant's first trial ended in a mistrial on January 30, 1992, because the jury could not reach a verdict. On March 11, 1992, a second jury convicted defendant of 19 counts of mail fraud and aiding and abetting, and one count of conspiracy to commit mail fraud.

II. EVIDENTIARY RULINGS

Thomas' major and most persuasive contention in this appeal is that the trial court erred in precluding him from putting on further evidence relevant to the purpose of the scheme and the issue of intent to defraud. The government selected some of the defendant's alleged "victims," named them in the indictment and then called them as witnesses to testify concerning the

effects of the underpayments they had received. The defendant was refused permission to cross-examine the prosecution's witnesses about the overpayments they had received. The district court also refused to allow the defendant to call other growers affected by the scheme, who may have been less hostile to the defendant than the government's witnesses, to testify about the benefits they had received from overreporting. In this manner, the jury was prevented from hearing any direct evidence either of the growers receipt of benefits, or of their overall perceptions of the scheme.

The government nevertheless contends that the court's refusal to permit Thomas to develop this evidence was not error, because the testimony of any growers not named in the indictment would have been irrelevant. It further argues that the expert's testimony provided a full defense with respect to named growers, and suggests that the direct grower evidence of overpayments defendant wished to elicit on cross examination would have been cumulative.

Beyond its conclusory statements, the government does not explain why direct evidence from growers not named in the indictment regarding the impact that the scheme had on them is irrelevant to the defendant's intent in devising the scheme. In order to obtain a conviction in this case, the government had to prove not only that the defendant had used the mails in order to defraud the individuals named in the indictment of money or property, but that he had devised a "scheme" that was intended to defraud the individuals. *See Dadanian*, 818 F.2d 1443. The "scheme"

described in the indictment unquestionably involved individuals other than those named in connection with specific mailings, and there is no basis for concluding that the scheme defendant had devised was intended to impact unnamed individuals any differently than those the government chose to name.

[2] In a case very similar to this one, the Eighth Circuit reversed a defendant's mail fraud conviction because the district court had prevented the defendant from introducing evidence relevant to his intent in making false statements on insurance applications. *United States v. Garvin*, 565 F.2d 519 (8th Cir. 1977). Defendant in that case was charged with making misrepresentations on some insurance applications in order to obtain additional policies. It was undisputed that defendant had in fact made false statements regarding the number of policies he owned on some of his insurance application forms. However, defendant contended that he had not intended to defraud the insurance companies when he made those false statements, and sought to introduce evidence that he had answered similar questions honestly on applications for other policies. As in this case, the government in *Garvin* argued that truthful statements to other insurance companies were irrelevant to defendant's intent with respect to the insurance companies he was accused of defrauding. The Eighth Circuit disagreed, and reversed Garvin's conviction. Similarly, the testimony of growers impacted by Thomas' scheme but not named in the indictment would have been relevant to defendant's intent in

devising the false reporting scheme.

The Federal Rules of Evidence provide that "relevant evidence [is] generally admissible." Fed.R.Evid. 402. In addition, the general rule in mail fraud prosecutions is that the defendant "should be permitted to offer any evidence which bears directly and not too remotely on his intention [to defraud], and the court should not exclude any evidence offered by accused which tends to refute the fraudulent intent charged." 72 C.J.S. *Postal Service* § 41(c) (1987). These rules reflect the fact that individuals accused of criminal behavior should be permitted to present, within reason, the strongest case they are able to marshal in their defense.

In this case, the jury was faced with a difficult issue of the defendant's subjective intent. There were no substantial countervailing justifications for limiting the relevant evidence that the jury could consider by excluding testimony of other growers. *See* Fed.R.Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). The district court found no such justification. It excluded the evidence, erroneously, as irrelevant.

[3] For the same reasons, the district court should have allowed the defense to cross-examine the named growers with respect to overpayments. The district court apparently agreed

with the government that such testimony would be cumulative of the expert's testimony the court did allow. As the only direct evidence concerning the overpayments, however, the growers' testimony would not have been cumulative of the abstract expert testimony proffered by the defendant's accountant. When trying to reach a conclusion about the elusive issue of intent, the subjective perceptions of the people most intimately involved with defendant and his averaging scheme could have had a significantly different impact on the jury than the expert's bare conclusion that these growers had not lost money.

Relevant case law in fraud prosecutions supports the defendant's position that he should have been permitted to develop fully and fairly all of the evidence that would tend to exonerate him. In *United States v. Foshee*, 569 F.2d 401 (5th Cir.), *amended*, 578 F.2d 629 (5th Cir. 1978), the Fifth Circuit reversed a defendant's mail fraud conviction because the district court had sustained the government's objection to a portion of the defendant's closing argument in which the defendant sought to emphasize that he lacked the requisite intent to defraud the victim banks in that case, as evidenced by the fact that none of the banks had lost any money. Significantly, the defendant in that case had been permitted to introduce direct evidence that the banks involved in the charged scheme had not lost money. This, however, did not render the district court's limitation on the defendant's closing argument harmless. In this case, of course, the prejudice

was greater than in *Foshee* because both defense argument and evidence were restricted. *See also United States v. Ethridge*, 948 F.2d 1215 (11th Cir. 1991) (in mail fraud prosecution, the defendant should have been permitted to introduce evidence that items legitimately claimed on an insurance claim form exceeded the policy limits in an attempt to defeat the inference that defendant had intended to defraud the insurance company with false claims); *Garvin*, 565 F.2d 519 (defendant should have been permitted to introduce statements made to insurance companies not named in the indictment on the issue of intent).

The prejudice from defendant's inability to present fact witnesses and cross-examine government witnesses on overpayments as well as underpayments was exacerbated by prosecution statements that, purposefully or not, may have misled the jury. During its summation, the prosecution repeatedly undermined the defense by stating that "averaging" payments is "no defense" to mail fraud, when in fact averaging is a defense insofar as it is relevant to intent. *See Foshee*, 569 F.2d at 403 (noting that court had compounded error of limiting defense argument by instructing jury that "the 'successor or failure of a scheme to defraud is immaterial,' without an accompanying admonition that it was relevant to the issue of intent"). In addition, the prosecutor stated, without evidentiary support, that no other fruit marketing company had engaged in a similar averaging scheme. This occurred after the prosecution had informed a defense witness, who could have testified that such averaging was a

common industry practice, that he was under investigation, thereby prompting the witness to invoke his Fifth Amendment right to refuse to testify. The prosecution also supplemented its own evidence of intent with Rule 404(b) evidence of a previous unrelated episode that the government had stipulated prior to trial that it would not elicit. *See, e.g., United States v. Bowen*, 857 F.2d 1337 (9th Cir. 1988) (government must be strictly held to its promises); *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978) (same).

We reverse defendant's conviction because the district court impermissibly and prejudicially limited the evidence that this criminal defendant was entitled to present. Although the evidence that was actually presented to the jury may have been sufficient to sustain defendant's conviction, that evidence was incomplete. In light of our resolution of this issue, we need not reach defendant's remaining arguments.

REVERSED AND REMANDED FOR A NEW TRIAL.

CURRENT RELEASE CALCULATIONS

Robert Charles Davis M.D.
Reg. No. 04160-081

Mandatory Goodtime Release Date: Dec. 9, 1997
Release Date with 18 U.S.C. Section 3621E eligibility: June 9, 1996
(this includes six months halfway house as prescribed by P.S. 5330.10, May 25, 1995 Chapter 5, Page 9)

Calculations:

1). On July 14, 1995 Robert Davis, who is currently enrolled in the Comprehensive Drug and Alcohol Program at FCI Lompoc was considered eligible for 19 U.S.C. Section 3621E early release. (See exhibit A.)

2). The Program Statement, OPI: CPD, number 5530.10 dated May 25, 1995 states at Chapter 6 at 6.1 that:

'Consideration for early release Section 550.58. An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligble for early release by a period not to exceed 12 months..." (Exhibit B)

The current Bureau of Prisons policy for anyone completing the Comprehensive Drug and Alcohol Program that is deemed eligible is a 12 month reduction in sentence.

3). Chapter 5, Page 9 of the Program Statement at (2) states:

"Consideration for the maximum period of time (currently 180 days in a Community Corrections Center placement, provided the

inmate is otherwise eligible for this designation." (Exhibit C)

Robert Davis is considered "eligible" and the current Bureau of Prisons Policy is 180 day halfway house placement.

UNITED STATES GOVERNMENT
MEMORANDUM
F.C.I. LOMPC
3600 GUARD RD.
LOMPOC, CA. 93436

DATE: July 14, 1995

FROM: Jane L. Murdock, PhD. /s/
Drug Abuse Program Coordinator

TO: DAP Inmates

RE: NOTIFICATION OF INMATE SECTION 3621E ELIGIBILITY

This memorandum serves to notify you of your eligibility for an 18 U.S.C. Section 3621E release date. You have been determined to be

XXXXXXX eligible

_____ ineligible

for early release consideration.

cc: Inmate
Unit Team
Inmate Systems Manger

Inmate Name: Davis, Robert
Number: 04160-081
Quarters: A2E29L

U.S. Department of Justice
Federal Bureau of Prisons

LOMPOC FCI

Program Statement

OPI: CPD
NUMBER: 5330.10
DATE: May 25, 1995
SUBJECT: Drug Abuse Programs Manual, Inmate

EFFECTIVE DATE: June 26, 1995

---

1. PURPOSE AND SCOPE § 550.50. **The Bureau of Prisons provides, subject to the availability of appropriated funds, drug abuse treatment programs to inmates.]** The purpose of this Manual is to establish operational policy and procedural guidelines for the delivery of drug abuse treatment services and to describe the general philosophy of treatment services guiding all Bureau drug abuse programs. Further, this Manual establishes implementation guidelines for the Violent Crime Control and Law Enforcement Act of 1994, specifically, amendments to 18 U.S.C. § 3621, Subtitle T, Substance Abuse Treatment in Federal Prisons.

2. PROGRAM OBJECTIVES. The expected results of this program are:

a. Inmates who need and want drug abuse treatment will be able to participate in one or more programs designed to assist them.

b. Inmates who meet certain criteria will be required to participate in drug abuse treatment programs.

c. Eligible inmates who successfully complete the Bureau's residential drug abuse

treatment program may earn up to a one year reduction from their statutory release date.

d. Inmates who violate program rules and expectations may be removed from a program and lose their eligibility for early release.

e. Inmates who participate in residential drug abuse programs will continue their drug abuse treatment when transferred to a Community Corrections Center.

f. Progress records on drug abuse treatment participants will be properly maintained.

[Bracketed Bold - Rules]
Regular Type - Implementing Information

CHAPTER 6

EARLY RELEASE QUALIFICATIONS

6.1 [Consideration for early release §550.58. **An inmate who completes a residential drug abuse treatment program during his or her current commitment may be eligible for early release by a period not to exceed 12 months, in accordance with paragraph (a) of this action, unless the inmate is an INS detainee, a pretrial inmate, a contractual boarder (for example, a D.C., State, or military inmate), or eligible for parole, or unless the inmate's current offense is determined to be a crime of violence as defined in 18 U.S.C. 924 (c)(3), or unless the inmate has a prior federal and/or state conviction for homicide, forcible rape, robbery, or aggravated assault.**

Drug abuse treatment staff shall determine an inmate's eligibility for early release consideration by:

- obtaining from the unit team the determination of the inmate's current offense of conviction regarding its definition as violent or non-violent.
- reviewing the inmate's PSI and, when not available in the PSI Report, the FBI Rap Sheet to determine if the inmate has any previous state or federal convictions for robbery, forcible rape, aggravated assault, or homicide.

If the inmate has been found to have an alcohol or drug use disorder and meets the eligibility criteria for early release consideration as

outlined in § 550.58, the drug abuse program coordinator shall notify the inmate, in writing, that he/she is eligible for early release consideration upon completing the residential drug abuse treatment program.

If the inmate has been found to have an alcohol or drug use disorder and does not meet the eligibility criteria for early release consideration as outlined in § 550.58, the drug abuse program coordinator shall notify the inmate, in writing, that he/she is eligible for treatment, but not for early release consideration.

Upon entry onto the Waiting List or into treatment, whichever comes first, the appropriate SENTRY DRG Assignments shall be entered (see Chapter 9).

6.1.1 **Retroactivity - Before October 1, 1989**. **[(a) Eligibility. (1) An inmate who had successfully completed a Bureau of Prisons residential drug abuse treatment program before October 1, 1989 is otherwise eligible if:**

The quarterly awards for eligible inmates help to offset the loss of performance pay which an inmate incurs as a result of participating in a residential program. Historically, inmates have cited the loss of performance pay as a reason for not enrolling in a program or as a reason for withdrawing from a program.

Funding for financial incentives for program participants has been considered in the development of the Inmate Performance Pay (IPP) formula. Using funds appropriated for drug treatment services, institutions with residential programs receive additional funding to their IPP cost center to support the incentive program. These monies may not be used for purposes other than residential drug abuse treatment program incentives.

[(2) Consideration for the maximum period of time (currently 180 days) in a Community Corrections Center placement, provided the inmate is otherwise eligible for this designation.]

Consistent with the Program Statement on Community Corrections Center (CCC) Utilization and Transfer Procedures, the Warden should consider inmates who successfully complete the institutional phase of residential drug treatment program for the maximum period of CCC placement if none of the exclusionary criteria delineated in policy apply

[(3) Local institution incentives such as preferred living quarters or special recognition privileges.]

To encourage consistency among programs, the following guidelines should be used in providing consumable incentives:

Items may include food products or small sums of monies deposited into each inmate's commissary account;

Only one such award should be granted per quarter in recognition of an individual's accomplishments;

No more than $15.00 per item per quarter should be expended for an individual inmate, limiting the total expenditure over the course of the program per inmate to $45.00 ($60.00 for 12 month programs).

To assist in recruiting inmates locally for residential drug abuse treatment, Wardens are encouraged to consider ways in which the treatment unit may be seen as preferred living quarters (e.g., washer/dryer access, special recreation or dining privileges) so that treatment unit housing itself is an incentive.

[(4) If eligible under Section 550.58, consideration for early release.] See Chapter 6.

STEPHEN R. McCAUGHEY - 2149
Attorney for Defendant/Appellant
10 West Broadway, Suite 650
Salt Lake City, Utah 84101
Telephone: (801) 364-6474

G. FRED METOS - 2250
Attorney for Defendant/Appellant
10 West Broadway, Suite 650
Salt Lake City, Utah 84101
Telephone; (810) 364-6474

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff/Appellee,

v.

ROBERT CHARLES DAVIS,

Defendant/Appellant,

PETITION FOR REHEARING

Case No. 93-4192
94-4147

The appellant, Robert C. Davis, by and through his attorneys of record G. Fred Metos and Stephen R. McCaughey, hereby petitions this court for a rehearing of Part I of the court's decision in the above-entitled case. In support thereof, appellant urges;

1. The court refused to reach the merits of the issues in Points I.A.,II and III of appellant's opening brief. The basis for this courts ruling was that appellant had failed to provide a transcript of the trial proceedings related to those issues. Those issues related to the lack of truthful answers by prospective jurors during the voir dire process and issues

related to the admission and exclusion of evidence.

2. Transcripts of all trial proceedings were ordered pursuant to Rule 10.1.1 of the Rules of Practice of the United States Court of Appeals for the Tenth Circuit on a form that was provided by the court. Transcripts of all trial proceedings from April 7, 1993, to May 7, 1993, were ordered and prepared and filed with the court. The jury selection in the District Court began on April 7, 1993. (Docket entry 108). That process continued through April 8, 1993. (Docket entry 109).

3. The relevant portions of the transcript relating to the issue briefed in Point 1.A. of appellant's opening brief were directly quoted in the trial court's ruling on appellant's motion for a new trial. (Docket entry 172 at pgs. 11-12, and 18-19). The portions of the transcript quoted in that decision were sufficient to provide the basis for appellate review of the issue related to the errors in the jury selection process raised in Point I.A of appellant's opening brief.

Wherefore, appellant prays that this court review and address the merits of those issues raised in Points I.A., II and III of appellant's opening brief. Appellant concedes that these issues have been fully briefed and argued before this court and further briefing and argument is not necessary.

DATED: This 8th day of August, 1995.

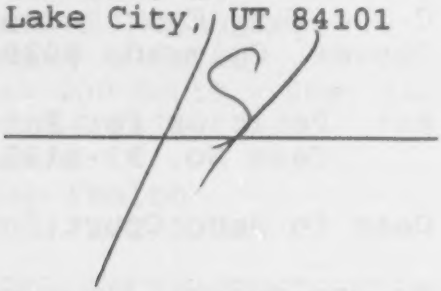
/S/

STEPHEN R. McCAUGHEY
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I certify that a true and correct coy of the foregoing was mailed/hand delivered on this 8th day of August, 1995, to:

Stanley H. Olsen
Assistant U.S. Attorneys
350 So. Main, #478
Salt Lake City, UT 84101



September 19, 1995

Robert Davis, M.D.
Reg. No. 04160-081
3600 Guard Road
Lompoc, California 93436

In Banc Court
Tenth Circuit Court of Appeals
C-404 U.S. Courthouse
Denver, Colorado 80294

Re: Petition for Rehearing in Banc
Case No. 93-4192 & 94-4147

Dear In Banc Court:

My apologies. Attached is the reverse side of Utah District Court 10.1.1 order form. (Exhibit "A")

Please note the underlined section in the Directions for the Court Reporter:

> "Transcripts in a criminal case (includes 28 U.S.C. Sections 2241, 2254, 2255) shall be filed within 30 days of the date arrangements for payment are made."

The transcripts had been paid in full by me nearly two years ago. (See also attached letter of September 13, 1995.)

I appreciate your time and consideration.

Sincerely,

Robert Davis M.D.
In Pro Se
cc: Fred Metos, attorney
Steven McCaughey, attorney
Stan Olsen, Assistant United States Atty.

DIRECTIONS FOR COMPLETING THIS FORM ARE ON THE REVERSE SIDE

PART I - To be completed by appellant within ten days of filing the notice of appeal

Short Title: USA v. Davis District: Utah
Dist. Court No.: 92-CR-211 Circuit Court No. 93-4192
Name of Attorney: G. Fred Metos & Stephen R. McCaughey
Name of Law Firm: McCaughey & Metos
Address of Firm: 72 East 400 South - Ste. 330
Phone No. of Firm: (801) 364-6474
Attorneys for: Defendant
Name of Court Reporter: Ray Fenlon
Phone No. of Reporter: (801) 322-0702

PART II - COMPLETE SECTION A OR SECTION B

SECTION A - I HAVE NOT ORDERED A TRANSCRIPT BECAUSE:

[] A transcript is not necessary for this appeal, or
[] The necessary transcript is already on file in District Court
[] The necessary transcript was ordered previously in appeal no._____

SECTION B - I HEREBY ORDER THE FOLLOWING TRANSCRIPT:
(Specify the date and proceeding in the space below)

Motions Hearings: 3/24/93; 4/2/93; 5/19/93; 6/14/93;
Jury Trial: 4/7/93 to 5/7/93
Sentencing Proceedings: 10/18/93

[x] Appellant will pay the cost of the transcript. My signature on this form constitutes my agreement to pay for the transcripts ordered on this form.

[ ] This case is proceeding under the Criminal Justice Act.

NOTE: Leave to proceed in forma pauperis does not entitle appellant to a free transcript. An order of the District court allowing payment for the transcript at government expense must be obtained. See 28 U.S.C. Section 753(f).

CERTIFICATE OF COMPLIANCE

I certify that I have read the instructions on the reverse of this form and that copies of this transcript order form have been served on the court report (if transcript ordered), the Clerk of the U.S. District Court, all counsel of record or pro se parties, and the Clerk of the U.S. Court of Appeals for the Tenth Circuit. I further certify that satisfactory arrangements for payment for any transcript ordered have been made with the court reporter(s).

Signature of Atty./~~Pro se~~: /S/ Date 10/25/93

PART III - TO BE COMPLETED BY THE COURT REPORTER

Upon completion, please file one copy with the Clerk of the U.S. court of Appeals and one copy with the Clerk of the U.S. District Court.

Date arrangements for payment completed: _____

Estimated completion date: _____

Estimated number of pages: _____

I certify that I have read the instruction on the reverse side and that adequate arrangements for payment have been made.

Signature of Court Report: _____ Date: _____

DIRECTIONS FOR USING THIS FORM

This form requires multiple distribution, service and filing. The responsibilities of each party and the court reporter are described below.

1. APPELLANT

Whether of not a transcript is ordered, appellant or his counsel must complete Part I and Part II of this form. Upon completion, appellant must serve a copy on:

a. the Court Reporter (if a transcript is ordered),
b. all parties,
c. the Clerk of the U.S. District Court, and
d. the Clerk of the U.S. Court of Appeals.

If a transcript is ordered, the appellant must obtain execution of this form by the court report(s) who recorded the proceedings. Within the ten day period allowed for ordered the transcript under Fed. R. App. P. 10(b)(1), appellant must make adequate arrangements for payment for the transcript. The Court Reporter may require a deposit equal to the full estimated cost of the transcript. 28 U.S.C. §753(f).

Unless the entire transcript is ordered, appellant shall serve on all appellees a statement of the issues he intends to present on appeal. Fed. R. App. P. 10(b)(3). The Docketing Statement required by 10th Cir. R. 3.4 fulfills this requirement.

Those portions of the transcripts that are filed that are pertinent to the appeal must be designated for inclusion in the record on appeal. 10th Cir. R. 10.2.1, 10.2.3 and 10.2.5.

2. APPELLEE

Unless the entire transcript is ordered, appellee may, within twenty days of filing of the notice of appeal, file and serve on appellant a designation of additional transcript to be included. If, within ten days, appellant does not order and pay for the transcript so designated, appellee may, within a further ten days, order and pay for the transcript or move in the district court for an order compelling appellant to do so. Fed. R. App. P. 10(b)(3).

3. COURT REPORTER

After receipt of this form and after satisfactory financial arrangements have been made. The court reporter shall certify the date of the transcript was ordered and estimate the date it will be completed. The estimated completion date must comply with the Tenth Circuit Judicial Council's mandated district court Court Reporter Management Plans. Transcripts in a criminal case (includes 28 U.S.C. §§2241, 2254, 2255) shall be filed within 30 days of the date arrangements for payment are made. Transcripts in a civil case shall be filed within 60 days of the date arrangements for payment are made. Court Reporters are subject to a mandatory fee reduction if transcripts are not timely filed. See Appellate Transcript Management Plan for the Tenth Circuit, 10th Cir. R., App. B.

The completed form must be served on:

a. the Clerk of the District Court and
b. the Clerk of the Court of Appeals.

September 13, 1995

Robert Davis M.D.
Reg. No. 04160-081
3600 Guard Road
Lompoc, California 93436

In Banc Court
Tenth Circuit Court of Appeals
C-404 U.S. Courthouse
Denver, Colorado 80294

Re: Petition for Rehearing in Banc

Case No. 93-4192 & 94-4147

Dear In Banc Court:

On September 6, 1995 I filed a Petition for Rehearing in Banc.

In that Petition I stated that pursuant to Exhibit "A" the transcripts were ordered pursuant to Rule 10.1.1 and filed with the court.

Today, I spoke with Ron Black appellate clerk for the Utah Federal District Court, Central Division, who stated that he has the transcripts but that they were never sent to the Tenth Circuit. This was in contradiction to the reverse side of the order form, Exhibit "A" that states that the transcripts will be forwarded to the Tenth Circuit by the appellate clerk.

I subsequently spoke with a Tenth Circuit clerk who advised me that I should write you this letter.

Apparently, this is something that has slipped through the cracks.

I am writing this letter to bring this to the attention of the in banc panel. This error was the mistake of the clerk, and not my fault.

I humbly appreciate your consideration of my Petition for Rehearing.

Sincerely,

Robert Davis M.D.
In Pro Se

cc: Fred Metos, attorney
Steven McCaughey, attorney
Stan Olsen, Assistant United States Attorney

ROBERT CHARLES DAVIS
Reg. No. 04160-081
3600 Guard Road
Lompoc, California 93436
517-487-6727 (contact no.)

In Pro Se

TENTH CIRCUIT

COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT CHARLES DAVIS, Defendant/Appellant.	REQUEST FOR JUDICIAL NOTICE AND MOTION FOR ORDER DIRECTING THE DISTRICT COURT TO FORWARD PREVIOUSLY ORDERED TRANSCRIPTS Case No. 93-4192 94-4147

COMES NOW THE Defendant/Appellant with Request for Judicial Notice and Motion for Order Directing the District Court to Forward Previously Ordered Transcripts.

STATEMENT OF FACTS

1). On September 6, 1995 the Defendant/Plaintiff filed a Petition for Rehearing in Banc in the Tenth Circuit Court of Appeals.

2). The Tenth Circuit panel had affirmed on a voir dir issue and two evidentiary issues

and remanded to the district court the issue of extraneous influences.

3). The tenth Circuit affirmed stating that the Defendant/Appellant did not provide transcripts.

4). In the Petition for Rehearing in Banc the Defendant/Appellant provided a copy of the original transcript order from, Exhibit "A." This order form verified that the transcripts were ordered and that pursuant to the reverse side of the order form, the transcripts should have been forwarded to the Tenth Circuit Court of Appeals by the Utah District Appellate Clerk.

5). Today, the Defendant/Appellant spoke with the Appellate Clerk, Ron Black, who stated that the transcripts were never sent. Apparently this had slipped through the cracks.

6). This error was not the fault of the Defendant/Appellant.

CONCLUSION

1. The transcripts were never sent to the Tenth Circuit Court of Appeals for the Defendant/Appellant's appeal of the Defendant/Appellant's criminal conviction by no fault of the Defendant/Appellant.

2. By the Tenth Circuit Court of Appeals not having the transcripts the Tenth Circuit was unable to consider the Defendant/Appellant's appeal on a voir dir question and two evidentiary issues.

3. The appropriate remedy would be for the Tenth Circuit Court of Appeals to order the District Court to forward the previously ordered, but never received, transcripts. Defendant/Appellant request such.

DATED: September 13, 1995

/S/

ROBERT CHARLES DAVIS
In pro Se

CERTIFICATE OF SERVICE

I hereby certify that I have served by first class postage prepaid mail a copy of this Request for Judicial Notice and Motion for Order Directing the District Court to Forward Previously Ordered Transcripts.

DATED: 13 September, 1995

/S/

ROBERT CHARLES DAVIS

Fred Metos, attorney
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

Steven McCaughey, attorney
10 West Broadway, Suite 650
Salt Lake City, Utah 84101

Stan Olsen, Assistant United States Attorney
Utah District Court Building
Salt Lake City, Utah 84101

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	Nos. 93-4192
v.	)	94-4147
	)	
ROBERT CHARLES DAVIS,	)	
	)	
Defendant-Appellant.	)	

ORDER

Filed October 12, 1995

Before TACHA, BRORBY, and HENRY, Circuit Judges.

This comes on for consideration of appellant's pro se Request for Judicial Notice and Motion for Order Directing the District Court to Forward Previously Ordered Transcripts.

On consideration whereof, the request and motion are denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /S/
Deputy Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
BYRON WHITE UNITED STATES COURTHOUSE
1823 STOUT STREET
DENVER, COLORADO 80257
(303) 844-3157

PATRICK FISHER
CLERK

ELISABETH A. SHUMAKER
CHIEF DEPUTY CLERK

October 12, 1995

Mr. Robert Davis #04160-081
3600 Guard Road
Lompoc, CA 93436

Re: 93-4192, USA v. Davis
Lower docket: 92-CR-211W,
94-4147, USA v. Davis
Lower docket: 92-CR-211W,

Dear Mr. Davis:

The court is returning your petition for rehearing in banc received September 18, 1995. A petition roe rehearing was filed August 9, 1995, by your attorney and denied by the panel on August 31, 1995.

Pursuant to 10th Cir. R. 40.4, the court cannot accept successive petitions for rehearing. 10th Cir. R. 40.4 "Successive Petitions -- The court will accept only one petition for rehearing from any party to an appeal and, regardless of the nature or substance of the motion, will not accept any motion to reconsider the court's ruling on a petition for rehearing."

Please call this office if you have any questions.

Sincerely,

PATRICK FISHER, Clerk

By: /s/
Deputy Clerk

PF:jtp

U.S. v. THOMAS
Cite as 32 F.3d 418 (9th Cir. 1994)

Before: HUG, SCHROEDER, and FERNANDEZ, Circuit Judges.

SCHROEDER, Circuit Judge:

Michael Thomas appeals his conviction and sentence for twenty counts of mail fraud in violation of 18 U.S.C. §§ 371 and 1341. The alleged fraud occurred when the defendant reported false prices to his customers in the course of his produce marketing operations. We reverse and remand for a new trial, because we find that the district court erred in limiting the evidence that defendant was permitted to introduce on the key issue of intent to defraud.

I. BACKGROUND

In 1987 and 1988, Thomas was the marketing coordinator of produce packing and marketing company that brokered sales of fruit between fruit growers and retail merchants. His company, Christian Salvesen Packing and Marketing ("CSPM") endeavored to obtain the highest possible price for growers' fruit, and then remitted the proceeds to the growers after deducting its own percentage commission and other fixed costs.

In early July 1987, Thomas implemented what he termed as "averaging scheme" on behalf of CSPM. When fruit prices were low, CSPM would report an artificially high price to the growers, and contribute its own money to make up the difference. When prices were high, on the other hand, CSPM would report an artifically low price to the growers, and retain some of the proceeds for itself. Thomas asserted that he took "concrete steps" to make sure that no grower lost money from the scheme, and the uncontested accounting evidence showed that the growers came out ahead by approximately $175,980.

As a result of this scheme, Thomas was indicted for mail fraud

in 1991. The superseding indictment charged that in 1987 and 1988, Thomas had operated a "scheme to defraud" growers in violation of 18 U.S.C. §§ 371 and 1341 by misrepresenting the actual prices received for their fruit. The government contended that the scheme was intended to defraud the growers by taking money that was rightfully theirs.

The superseding indictment specifically described overpayments as well as underpayments as part of this fraudulent scheme. It alleged that by overpaying the growers in some instances, the defendant deprived the growers of knowledge of the exact price for which their product was sold, and "the opportunity to accurately evaluate the ability of CSPM... to sell their fruit of the highest possible price." However, the mail fraud counts set forth to the indictment included only mailings of underpayments.

[1] In a mail fraud prosecution the government must prove beyond a reasonable doubt (1) that a defendant devised "any scheme or artifice to defraud," and (2) that the defendant used the mails or caused the mails to be used in furtherance of the scheme. *United States v. Dadanian*, 818 F.2d 1443 (9th Cir. 1987), *modified on rehearing*, 856 F.2d 1391 (9th Cir. 1988); *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466 (9th Cir. 1987), *cert, denied*, 484 U.S. 1006, 108 S.Ct. 698, 98 L.Ed.2d 650 (1988). In this case, the principal issue at trial was whether the scheme that Thomas had devised was on "intended to defraud." It is important in this case that at the time of defendant's actions, a deprivation of honest services and fair dealing did not constitute a mail fraud offense; rather, the defendant must have intended to deprive his victims of money or property. *See McNanny v. United*

States, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), *overruled by statute*, 18 U.S.C. § 1346 (Supp. 1994).

The defendant maintained at trial that the purpose of the system was not to defraud the growers of money, but to even out fluctuating crop prices in order to assuage grower discontent. To rebut the government's evidence of intent, the defendant wished to elicit testimony from individual growers regarding their business dealings with CSPM and their reactions to the averaging scheme, and to submit evidence that the growers actually came out ahead as a result of the scheme. The district court, however, limited the defendant's evidence of intent to the expert testimony of one accountant, who testified that the specific growers the government had named in its indictment had received overpayments as well as underpayments, and that during the years in question those growers had in fact come out ahead by more than $175,000 as a result of the erroneous reporting.

Defendant's first trial ended in a mistrial on January 30, 1992, because the jury could not reach a verdict. On March 11, 1992, a second jury convicted defendant of 19 counts of mail fraud and aiding and abetting, and one count of conspiracy to commit mail fraud.

II. EVIDENTIARY RULINGS

Thomas' major and most persuasive contention in this appeal is that the trial court erred in precluding him from putting on further evidence relevant to the purpose of the scheme and the issue of intent to defraud. The government selected some of the defendant's alleged "victims," named them in the indictment and

then called them as witnesses to testify concerning the effects of the underpayments they had received. The defendant was refused permission to cross-examine the prosecution's witnesses about the overpayments they had received. The district court also refused to allow the defendant to call other growers affected by the scheme, who may have been less hostile to the defendant than the government's witnesses, to testify about the benefits they had received from overreporting. In this manner, the jury was prevented from hearing any direct evidence either of the growers receipt of benefits, or of their overall perceptions of the scheme.

The government nevertheless contends that the court's refusal to permit Thomas to develop this evidence was not error, because the testimony of any growers not named in the indictment would have been irrelevant. It further argues that the expert's testimony provided a full defense with respect to named growers, and suggests that the direct grower evidence of overpayments defendant wished to elicit on cross examination would have been cumulative.

Beyond its conclusory statements, the government does not explain why direct evidence from growers not named in the indictment regarding the impact that the scheme had on them is irrelevant to the defendant's intent in devising the scheme. In order to obtain a conviction in this case, the government had to prove not only that the defendant had used the mails in order to defraud the individuals named in the indictment of money or property, but that he had devised a "scheme" that was intended to defraud the

individuals. *See Dadanian*, 818 F.2d 1443. The "scheme" described in the indictment unquestionably involved individuals other than those named in connection with specific mailings, and there is no basis for concluding that the scheme defendant had devised was intended to impact unnamed individuals any differently than those the government chose to name.

[2] In a case very similar to this one, the Eighth Circuit reversed a defendant's mail fraud conviction because the district court had prevented the defendant from introducing evidence relevant to his intent in making false statements on insurance applications. *United States v. Garvin*, 565 F.2d 519 (8th Cir. 1977). Defendant in that case was charged with making misrepresentations on some insurance applications in order to obtain additional policies. It was undisputed that defendant had in fact made false statements regarding the number of policies he owned on some of his insurance application forms. However, defendant contended that he had not intended to defraud the insurance companies when he made those false statements, and sought to introduce evidence that he had answered similar questions honestly on applications for other policies. As in this case, the government in *Garvin* argued that truthful statements to other insurance companies were irrelevant to defendant's intent with respect to the insurance companies he was accused of defrauding. The Eighth Circuit disagreed, and reversed Garvin's conviction. Similarly, the testimony of growers impacted by Thomas' scheme but not named in the indictment would have been

relevant to defendant's intent in devising the false reporting scheme.

The Federal Rules of Evidence provide that "relevant evidence [is] generally admissible." Fed.R.Evid. 402. In addition, the general rule in mail fraud prosecutions is that the defendant "should be permitted to offer any evidence which bears directly and not too remotely on his intention [to defraud], and the court should not exclude any evidence offered by accused which tends to refute the fraudulent intent charged." 72 C.J.S. *Postal Service* § 41(c) (1987). These rules reflect the fact that individuals accused of criminal behavior should be permitted to present, within reason, the strongest case they are able to marshal in their defense.

In this case, the jury was faced with a difficult issue of the defendant's subjective intent. There were no substantial countervailing justifications for limiting the relevant evidence that the jury could consider by excluding testimony of other growers. *See* Fed.R.Evid. 403 ("evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence"). The district court found no such justification. It excluded the evidence, erroneously, as irrelevant.

[3] For the same reasons, the district court should have allowed the defense to cross-examine the named growers with respect to overpayments. The

district court apparently agreed with the government that such testimony would be cumulative of the expert's testimony the court did allow. As the only direct evidence concerning the overpayments, however, the growers' testimony would not have been cumulative of the abstract expert testimony proffered by the defendant's accountant. When trying to reach a conclusion about the elusive issue of intent, the subjective perceptions of the people most intimately involved with defendant and his averaging scheme could have had a significantly different impact on the jury than the expert's bare conclusion that these growers had not lost money.

Relevant case law in fraud prosecutions supports the defendant's position that he should have been permitted to develop fully and fairly all of the evidence that would tend to exonerate him. In *United States v. Foshee*, 569 F.2d 401 (5th Cir.), *amended*, 578 F.2d 629 (5th Cir. 1978), the Fifth Circuit reversed a defendant's mail fraud conviction because the district court had sustained the government's objection to a portion of the defendant's closing argument in which the defendant sought to emphasize that he lacked the requisite intent to defraud the victim banks in that case, as evidenced by the fact that none of the banks had lost any money. Significantly, the defendant in that case had been permitted to introduce direct evidence that the banks involved in the charged scheme had not lost money. This, however, did not render the district court's limitation on the defendant's closing argument harmless.

In this case, of course, the prejudice was greater than in *Foshee* because both defense argument and evidence were restricted. *See also United States v. Ethridge*, 948 F.2d 1215 (11th Cir. 1991) (in mail fraud prosecution, the defendant should have been permitted to introduce evidence that items legitimately claimed on an insurance claim form exceeded the policy limits in an attempt to defeat the inference that defendant had intended to defraud the insurance company with false claims); *Garvin*, 565 F.2d 519 (defendant should have been permitted to introduce statements made to insurance companies not named in the indictment on the issue of intent).

The prejudice from defendant's inability to present fact witnesses and cross-examine government witnesses on overpayments as well as underpayments was exacerbated by prosecution statements that, purposefully or not, may have misled the jury. During its summation, the prosecution repeatedly undermined the defense by stating that "averaging" payments is "no defense" to mail fraud, when in fact averaging is a defense insofar as it is relevant to intent. *See Foshee*, 569 F.2d at 403 (noting that court had compounded error of limiting defense argument by instructing jury that "the 'successor or failure of a scheme to defraud is immaterial,' without an accompanying admonition that it was relevant to the issue of intent"). In addition, the prosecutor stated, without evidentiary support, that no other fruit marketing company had engaged in a similar averaging scheme. This occurred after the prosecution had informed a defense witness, who could

have testified that such averaging was a common industry practice, that he was under investigation, thereby prompting the witness to invoke his Fifth Amendment right to refuse to testify. The prosecution also supplemented its own evidence of intent with Rule 404(b) evidence of a previous unrelated episode that the government had stipulated prior to trial that it would not elicit. *See, e.g., United States v. Bowen*, 857 F.2d 1337 (9th Cir. 1988) (government must be strictly held to its promises); *United States v. Powell*, 587 F.2d 443 (9th Cir. 1978) (same).

We reverse defendant's conviction because the district court impermissibly and prejudicially limited the evidence that this criminal defendant was entitled to present. Although the evidence that was actually presented to the jury may have been sufficient to sustain defendant's conviction, that evidence was incomplete. In light of our resolution of this issue, we need not reach defendant's remaining arguments.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH
CENTRAL DIVISION

UNITED STATES OF AMERICA,	Case No. 92-CR-211W
Plaintiff,	ORDER OF RESTITUTION
vs.	
ROBERT CHARLES DAVIS,	
Defendant.	

A final hearing on the issue of how much restitution the defendant should be ordered to pay, was heard on May 27, 1994. The plaintiff was represented by Stanley H. Olsen and Barbara Bearnson. The defendant was represented by Stephen R. McCaughey and G. Fred Metos. Prior to this hearing, various rulings and stipulations pertaining to the issue of restitution had been made. Those rulings and stipulations will not be repeated herein. Also, prior to the May 27, 1994 hearing, the court had received various information from representatives of both parties. At the hearing on May 27, each side presented the testimony of witnesses, and various exhibits. Certain facts were stipulated to, and these were stated in the record. At the conclusion of the evidence, the court heard brief oral argument from counsel and then took the matter under advisement. Since then the court has further considered the law and the facts relating to this matter.

No being fully advised, the court enters the following findings of fact that are necessary to be made pursuant to 18 U.S.C. Sections 3663 and 3664.

FINDINGS OF FACT

1. The following named victims have suffered direct harm from the defendant's criminal conduct for which he was convicted, and the amount of the loss to these victims is as follows:

(a) The patients, Medicaid, and the private insurance companies who were the victims in the counts of the indictment of which the defendant was convicted sustained loss in the amount of $15,402.76.

(b) Between November 29, 1990, and July 29, 1992, Medicaid sustained actual loss as a result of the defendant's criminal acts, in the amount of $109,095.00, which loss is in addition to the loss of $15,402.76 referred to in paragraph 1(a).

(c) Between November 29, 1990, and July 29, 1992, various private insurance companies referenced in exhibits received at the hearing of May 27, 1994, sustained actual loss as a result of the defendant's criminal acts, in the amount of $34,011.00, which loss is in addition to the losses of $15,402.76 and $109,095.00 referred to in paragraphs 1(a) and 1(b).

2. Based on the information set forth in the presentence report, the court finds that the financial resources and earning ability of the defendant are sufficient to enable him to pay the restitution set forth in this order, and that his own and his dependents' financial needs do not require a different finding.

3. The court has considered the above-referenced factors and all other factors bearing on the issue of restitution and is of the opinion that the restitution referred to herein should be ordered to be paid by the defendant, Robert C. Davis, to the victims named herein.

Accordingly, based on the foregoing Findings of Fact, and good cause appearing,

IT IS HEREBY ORDERED as follows:

1. The defendant is ordered to make restitution to the patients, Medicaid, and private insurance companies who are the subject matter of the counts of conviction, in the amount of $115,402.76.

2. The defendant is ordered to make

restitution to Medicaid in the amount of $109,095.00, this being in addition to the sum referred to in paragraph 1 of this Order.

3. The defendant is ordered to make restitution to private insurance companies in the amount of $34,011.00., this being in addition to the sums referred to in paragraphs 1 and 2 of this Order.

DATED this 31st day of May, 1994.

BY THE COURT:

/s/

David K. Winder
Chief Judge

CERTIFICATE OF SERVICE

Copies of the foregoing Order of Restitution were served, this 31st day of May, 1994, addressed as follows:

Stanley H. Olsen
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/s/
Secretary (Norrine Gerdiner)